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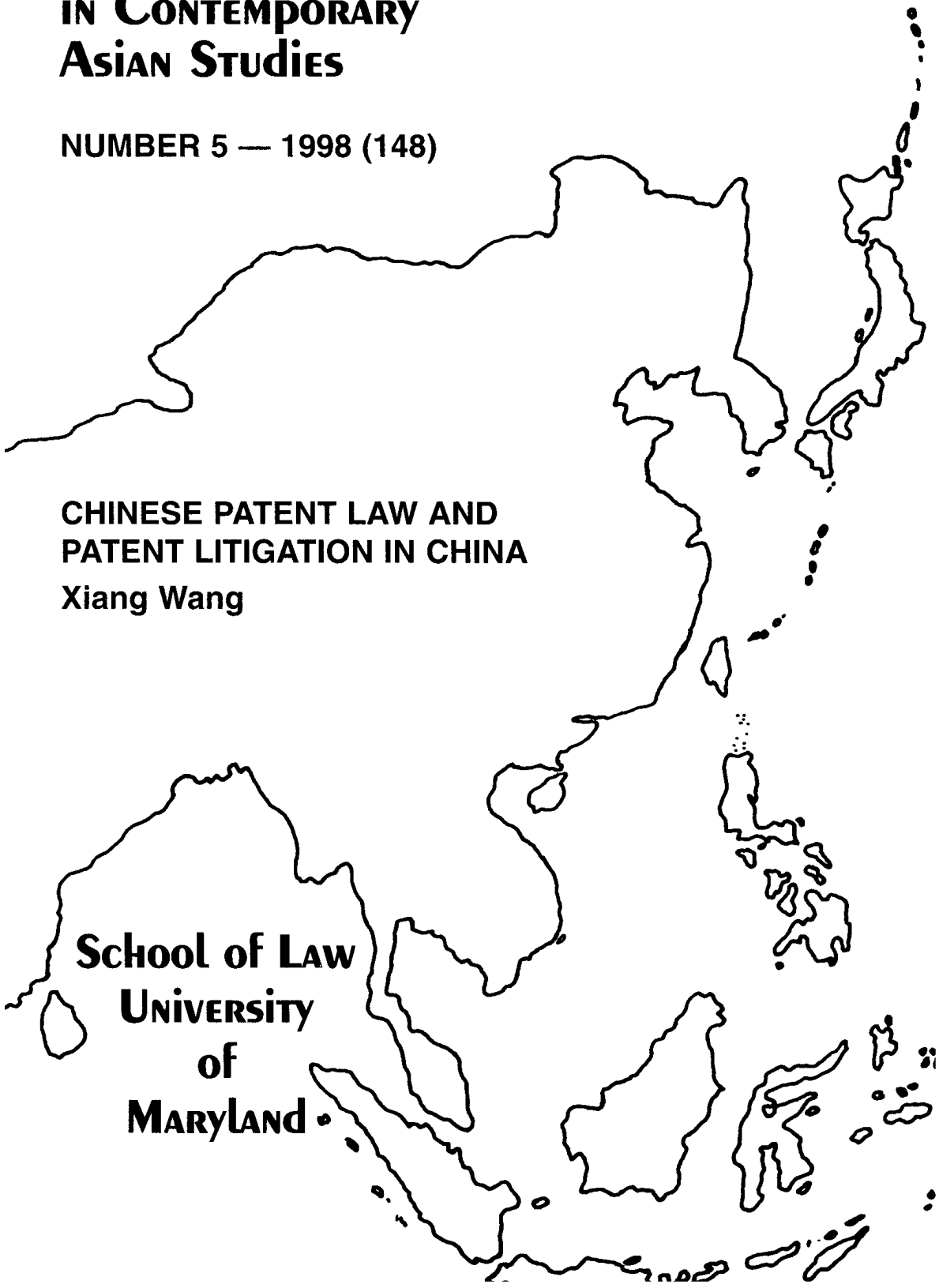

CHINESE PATENT LAW AND PATENT LITIGATION IN CHINA

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*Xiang Wang**

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CHINESE PATENT LAW AND PATENT LITIGATION IN CHINA

Xiang Wang

I. INTRODUCTION

With China's great success in economic reform in recent years, it now has become the world's eighth-largest trading nation. It has one of the world's largest GNPs and a higher growth rate than any other major economy in the world. As Chinese economy continues to improve and its people attain better living standards, China will soon be one of the world's largest markets for virtually everything, especially for the sale and licensing of intellectual property-based goods and services. This is evidenced by the ever increasing foreign investment in China, especially in the high-tech sector. More than 300 of the 500 largest companies in the world have invested in China. For the past two decades, foreign investment in China has exceeded $370 billion. For the past 5 consecutive years, China has attracted more foreign investment than any other developing nation in the world.[1] During the period 1993 to 1997 alone, high-tech related foreign investments in China reached a total of U.S. $185.8 billion.

However, intellectual property rights (IPR) protection in China still lags behind the rest of the world in many areas. For instance, violations of patents, copyrights and trademarks are still prevalent today. In a recent report by Seth Faison in *The New York Times*, copyright pirates distributed their wares in China unchecked. The Hollywood movie "Titanic," as popular in China as everywhere else, had been sold in Shanghai since late November 1997, a month before its theatrical release in the United States.[2] The open sale of pirated movies signals a failure of the IPR agreement that China reached with the United States in 1995, pledging

1. HAI Jiao Cui, *Shi Jie Wu Bai Qiang Gong Si You San Bai Duo Jia Lai Hua TouZi* (Among the 500 world's largest companies, over 300 of them have invested in China.) Beijing: *Ren Min Ri Bao Hai Wai Ban* (People's daily, overseas edition), June 13, 1998, p. 1, *also see* LI De Jin, *Zhong Guo Jia Ru Zhuan Li He Zuo Tiao Yue Cheng Guo Xi Ren* (Promising result after China joined the patent cooperation treaty), Beijing: *Ren Min Ri Bao Hai Wai Ban* (People's daily, overseas edition), April 16, 1998, p. 1.

2. Seth Faison, "China Turns Blind Eye to Pirated Disks." *The New York Times*, March 28, 1998, pp. B1-B2.

vigorous enforcement.[3] Intellectual property protection covers many areas of property rights, i.e., patents, copyrights and trademarks, to name just a few. IPR protection in China is a very complicated matter, because it involves many factors that are beyond the discussion and the scope of this paper. The author will only discuss issues relating to IPR protection for patents in China.

It seems that China is aware of obstacles on its path to build a better patent system and it has made tremendous strides to improve the existing patent system so that China can better deal with other nations on equal footing. Since the inception of the new Chinese Patent Law (CPL) in 1984, there were over 625,309 patents granted by the China Patent Office (CPO) through 1996, among which 168,744 were invention patents, 366,301 were utility patents and 90,264 were design patents.[4] During this period, applications from foreign countries totaled 87,428.[5] As of September 1998, the United States alone filed 35,295 patent applications in China (5,919 for 1997).[6] With further improvement in its investment environment, the huge Chinese market is expected to attract even more foreign applicants to file patents in China.

Perhaps one of the most important changes in the Chinese legal system was ushered in by the June 1993 National Meeting for Directors of Provincial and Municipal Department of Justice. At this meeting, a new lawyer system was proposed. The participants were urged to build a new independent lawyer system that is no longer controlled by the government.[7] It proposed to change the old system under which all lawyers were government employees, who were paid by the government and spoke for the government, a system that did not work well for private entities. Under the proposed new lawyer system, law firms would be private and independent of the government's control, thus better representing clients. No government funding would be provided to law firms and they would be entirely self-sufficient. This proposal led to the establishment of the first private patent law firm in China in 1992, with the retired

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3. *Id.*

4. YUAN De, *Wu Guo Zhuan Li Shen Qing Fang Xing Wei Ai* (The booming of patent applications in China), Beijing: *Fa Zhi Ri Bao* (Legal daily), June 24, 1997, p. 4.

5. *Id.*

6. LI De Jin, *Wo Guo Shou Li Zhuan Li Shen Qing Chi Xu Zeng Zhang* (The number of patent applications in China increases steadily.) Beijing: *Ren Min Ri Bao Hai Wai Ban* (People's daily, oversees edition), October 30, 1998, p. 1.

7. LIU Gu Shu, *Zhong Guo Zhi Shi Chan Quan Zhi Du De Hui Gu Yu Jian Yi* (Review and suggestions to the intellectual property system of China), Hong Kong: China Law (Chinese-English Bilingual), vol. 2, January 1995, pp. 11-12 (Chinese).

former CPO director, Dr. SHEN Xiao Zen, as one of the partners.[8] At the end of 1994, over 500 private patent law firms came into existence, and they have handled more than 70% of the patent applications at that time.[9] The author expects that the number of private patent law firms has significantly increased in China since then.

In order to better suit China in the ever-increasing competitive international market of intellectual properties, and to improve the quality of Chinese intellectual property law professionals, the China State Council (CSC) on April 1, 1996 approved the opening of the first China Training Center for Intellectual Property Rights located in Beijing.[10] This training center is run directly under the supervision of the State Council; several board directors are from the Chinese Communist Party Central Committee (CCPCC), China Supreme People's Court (CSPC), State Science Commission (SSC) and the CPO. This training center also invited 11 internationally-known intellectual property law professionals to serve on its advisory committee, including one from World Intellectual Property Organization (WIPO), one from the United States and one from France.[11] This state-sponsored training center manifests the willingness and effort the Chinese government is putting out for the protection and improvement of IPR in China.

Despite the noticeable effort made by the Chinese government and the marked improvement in China's patent law, foreign investors still face the reality that they might not successfully protect their intellectual property investments in China, due to the lack of China's enforcement of its patent law. In Jiangsu province, for instance, it was reported that some governments of local counties supported their local industries "passing-off" patented products, foreign or domestic indiscriminate, using such passing-off as a way to "get out of poverty, get into prosperity."[12] The local governments even tolerated a special street set up by local business entities for passing-off patented products, blatantly calling the street as

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8. *Id.*

9. SHEN Xiao Zen, *Guan Yu Jia Qiang Zhong Guo Zhuan Li Bao Fu Wen Ti De Tan Tao* (A discussion of how to enhance patent protection in China), Hong Kong: China Law (Chinese-English Bilingual), Initial Issue, December 1994, pp. 67-69 (Chinese).

10. MA Fang, *Zhi Shi Chan Quan Ren Cai De Yao Lan* (The cradle of intellectual property law professionals), Beijing: *Fa Zhi Ri Bao* (Legal daily), June 17, 1997, p. 5.

11. *Id.*

12. WANG Jun, *Zhuan Li Jiu Fen An Jian De Fa Zhan Qu Shi Ji Shen Li Dui Ce* (The trend and trial strategy of patent disputes), Beijing: *Fa Xue Za Zhi* (Law magazine), April 1993, pp. 34-35.

"patent products passing-off street."[13] Some entities knowingly violated patent rights for personal profit. Some others made minor changes or improvements over existing patents, or only changed the packaging, or combined several patents together, claiming them as their own patented products. Some used passing-off as a way of making quick profits, then by utilizing such profits, changed into other businesses, or used such passing-off profits as a "life sustaining line" to revitalize their own industries.[14]

Although today in China the situation may have significantly improved, as more and more foreign technologies pour into China everyday, how to effectively protect foreign technology investments has become a major issue for many foreign governments and corporations. This issue is especially apparent in the vigorous negotiations between the United States and China in recent years.

This paper is intended to analyze the Chinese patent law and patent system based upon China's rather complicated judicial, social and political background and their influences and limitations, utilizing the currently existing patent litigation cases available to the author, and to compare them to those of the U.S. patent statute and patent system. The author will provide results and evaluate future prospects of Chinese patent law and patent litigation involving foreign entities in China, hoping to provide some insight to readers in preparing their patent litigation in China, or in preparing their technology transfer to China.

II. BRIEF HISTORICAL REVIEW OF PATENTS IN CHINA

As early as 1898, the Chinese Qing Dynasty (1644-1912) issued the first intellectual property right protection code, "Reward Regulations for Vitalizing Technologies and Crafts," which granted patents to different new methods and new products with monopolies of 50, 30 or 10 years.[15] After the overthrow of the Qing empire by the Chinese bourgeois democratic revolution led by Dr. SUN Yat-sen in 1912, the Republican government established an "Interim Reward Regulations for Technologies and Crafts," granting a 5-year patent monopoly or honorary certificate for inventions or improvements made to products, excluding food and medicine.[16]

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13. *Id.*, p. 34.
14. *Id.*
15. ZHANG Ping, *Zhi Shi Chan Quan Xiang Lun* (Intellectual property law analysis), Beijing: *Beijing Da Xue Chu Ban She* (Beijing university press), 1994, pp. 43-44.
16. *Id.*

In 1932, the Republican government issued another, more complete code, the "Interim Reward Regulations for Industrial Technologies," which set up more details for the methods of qualification, proving, certificate and reward. The code also appointed specific organizations to be responsible for this task. The code was amended in 1939, adding two more patent types, the "utility patent" and "design patent."[17]

On May 29, 1944, the first formal "Patent Law" was issued by the Nationalist Republic of China government. This patent law granted 15, 10 and 5 year monopolies to an invention patent, utility patent and design patent, respectively. Subsequently, the Nationalist government attempted to form a national patent office, but this effort failed due to the civil war between the Nationalist government and Communist government that caused the Nationalist government to move its capital several times.[18] As a result, this patent law was never enforced and thereafter the Nationalist government moved to Taiwan in 1949 at the end of this civil war.[19]

Despite these limited efforts by the different Chinese governments, IPR received little protection in reality, both before the fall of the Qing empire in 1912 and in the ensuing Republican era, which was followed by decades of civil war, famine and revolution, making the protection of IPR virtually nonexistent.[20]

After the founding of the People's Republic of China (PRC) by the Chinese Communist Party on October 1, 1949, all laws of the former Nationalist government were abolished.[21] In August 1950, the new government issued "Interim Regulations on Protection of the Rights of Invention and Patent." These regulations adopted the former Soviet Union's system to grant invention certificates and patent certificates for a valid period of 3-15 years. The invention award, normally monetary, or a medal or certification of honor, was issued for any invention (or imitation) potentially affecting the national interest or beneficial to the "majority of people," such as military technology and pharmaceuticals. The patent was applied to

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17. *Id.*

18. *Zhong Hua Min Guo Guo Jia Jian She Cong Kan Bian Ji Wei Wuan Hui* (Editorial board of the Republic of China national construction series), *Guo Jia Jian She Cong Kan* (National construction series), Taiwan: Guo Fang Bu Yin Zhi Chang (Department of defense press), 1971, vol. 6, at pp. 392-393.

19. ZHANG Ping, Intellectual Property Law Analysis, *supra* note 21, pp. 43-44.

20. W.P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization*, Stanford: Stanford University Press, 1995, pp. 30-55.

21. ZHANG Ping, Intellectual Property Law Analysis, *supra* note 21, pp. 43-44.

lesser inventions, and the patentee could exploit the product as an exclusive property right.[22]

In 1954, the "Interim Reward Regulations for Production Inventions, Technology Improvements and Reasonable Suggestions" were issued by the government, giving monetary reward to anyone who received an invention certificate.[23]

The anachronism of such a patent soon became obvious as China began to nationalize industry and commerce in the socialist transformation, moving towards a central government-controlled socialist economy. In 1963, the State Council abolished the Interim Regulations and replaced it with "Invention Reward Regulations," formally ending the patent law in China, followed by a system that rewards invention, but not invention protection. During the short life of the 1950 Interim Regulations, only six invention awards and four patents were issued.[24]

China then endured internal turmoil and "class struggle," followed by one political movement after another, especially the notorious 10-year "cultural revolution" that devastated the Chinese economy until in 1976 - the year that Chairman MAO passed away. The turmoil converted the Chinese legal system into a quasi-political judicial system. China became a country in which the government owned virtually all property rights, and the concept of monopolies or exclusive rights of intellectual property was unthinkable. For almost 20 years after abolishing the Interim Regulations, patents were never on the agenda of the Chinese government.[25]

In fact, the protection of patents was almost entirely ignored by the Chinese legal system until China opened its door to the outside world after 1976. The rebuilding of Chinese intellectual property law, patent law in particular, started after the Eleventh Meeting of the CCPCC in December 1978. To get a jump start and learn patent systems from foreign nations, China sent out its patent investigation teams during 1979 to more than a dozen advanced countries, from which many patent laws and related procedures were extracted as suitable for China's existing system.[26] Many of these foreign laws and procedures were later adopted in the first draft of the Chinese patent law.

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22. Peter FENG, *Intellectual Property in China*, Hong Kong: Sweet & Maxwell Asia, 1997, pp. 141-142.

23. ZHANG Ping, Intellectual Property Law Analysis, *supra* note 21, pp. 43-44.

24. *Id.*

25. *Id.*

26. LIU Gu Shu, Review and Suggestion, *supra* note 13, p. 12.

In order to fulfill its "open door" policy and reduce the distance to the international community on patent protection, the CPO was formed subsequently in January 1980.

China submitted its application to the WIPO on March 3, 1980, and became a member of WIPO on June 3 of the same year. This indicated that China had realized the necessity of IPR and had taken the first step to recognize IPR in order to join the international market.

On March 12, 1984, the sixth People's Congress passed the "People's Republic of China Patent Law," effective from April 1, 1985.[27] On March 19, 1985, China became a member of the Paris Convention for the Protection of Industrial Property.[28]

However, the 1984 patent law restricted patent protection in key areas of national interest, because pharmaceuticals for human use, chemical process, cosmetics, food and beverages were excluded.[29] Since the 1984 patent law did not provide protection in these areas, foreign goods could not be effectively protected. It was estimated that annual losses suffered just by American firms from Chinese patent infringement and industrial piracy in the late 1980s and early 1990s was as high as $400 million.[30] According to the U.S. Special Section 301 provision of the Omnibus Trade and Competitiveness Act of 1988, the United States Trade Representative (USTR) identified China as having failed to provide adequate and effective protection of intellectual property rights and proposed to put China on the "priority watch list"; China thus would face substantial remedial measures, including trade sanctions, import duties and other economic restrictions.[31] In January 1992, just before the United States trade sanctions were to be implemented on Chinese imports, China and the United States signed a second memorandum of understanding, wherein China agreed among other things to

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27. SHEN Xiao Zen and Tang Zong Yao, *Zhong Hua Ren Min Gong He Guo Zhuan Li Fa* (Patent law of the People's Republic of China), *An Hui Ke Xue Ji Shu Chu Ban She* (Anhui province science and technology press), 1985, pp. 3-33.

28. Paris Convention for the Protection of Industrial Property, as last revised at Stockholm on July 14, 1967.

29. Peter FENG, *Intellectual Property in China*, *supra* note 28, p. 145.

30. Michel Oksenberg, Pitman B. Potter and William B. Abnett, *Advancing Intellectual Property Rights: Information Technologies and the Course of Economic Development in China*, Seattle: The National Bureau of Asian Research, vol. 7, no. 4, November, 1996, p. 7.

31. *Id.*

improve its protection on patented pharmaceuticals, chemicals and copyrighted materials including computer software.[32]

Subsequently, on September 4, 1992, the Seventh People's Congress amended the 1984 patent law, lifting these exclusions along with many other changes, effective from January 1, 1993.[33] The 1984 patent law was also drastically revised to recognize the principle of national and reciprocal treatment for foreign applicants who do not have habitual residence or a business office in China, as well as the Paris Convention right of priority and independence of patents obtained for the same invention in different countries.[34]

Regardless, the 1984 patent law served as a stimulus for a number of reforms in the reward system. It introduced private proprietary interests in inventions and innovations in general and intensified, for the first time since the economic reform, the need to divide interests between the state, the work unit and the individual.[35]

International pressures further prompted the Chinese legislature towards compliance with the level of protection in the more advanced regimes. More importantly, through practice and training, the China Patent Office, the People's Court and the professionals in the field had gained experiences on which to base an revision vis-à-vis the aggressive demands from the U.S. trade and intellectual property rights negotiators. The final push came from the January 17, 1992 Sino-US Memorandum of Understanding on PRC protection in which China committed itself to upgrading its patent law to meet specified international standards.[36]

Intellectual properties in China, patents in particular, are covered basically by four areas of law. The Chinese Constitution set up the basic principle that China recognizes intellectual property rights.[37] Article 20 of the Chinese Constitution states that "[t]he state promotes the development of the natural and social sciences, disseminates scientific and technical knowledge, and commends and rewards achievements in scientific research as well as technological discoveries and inventions."[38] Article 47 states that "[c]itizens of

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32. *Id.*

33. ZHANG Ping, Intellectual Property Law Analysis, *supra* note 21, pp. 46-47.

34. *Id.*

35. *Id.*

36. Peter FENG, Intellectual Property in China, *supra* note 28, p. 145.

37. THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (1982), (Beijing Foreign Languages Press, 1983).

38. *Id.*, art. 20.

the People's Republic of China have the freedom to engage in scientific research, literary and artistic creation and other cultural pursuits. The state encourages and assists creative endeavors conducive to the interests of the people that are made by citizens engaged in education, science, technology, literature, art and other cultural work."[39] Also stated in Article 89, clause 7, that "[t]he State Council exercises the following functions and powers: . . . (7). to direct and administer affairs of education, science, culture . . ."[40]

Article 95 of the Chinese Civil Code states that "the patent rights legally obtained by a citizen or a legal person are protected by this civil code."[41]

The new Chinese Criminal Law adopted by the Standing Committee of the National People's Congress on March 14, 1997, now contains 449 articles. Among other major improvements, the new law revised the old Article 79 "crimes by analogy" under which a crime not expressly stipulated in the code may be determined and punished according to the most closely analogous article.[42] The new code adopted the principle of no crime without pre-existing law, thus making punishment fit the crime.[43] Article 216 of the Chinese Criminal Law provides a penalty of either a fixed-term imprisonment or detention for not more than three years and/or a fine, to those who intentionally violate the patent rights of others.[44]

The most pertinent law is the "Patent Law of the People's Republic of China" as amended in 1992.[45]

The Chinese judicial system also followed the pace of the rapidly developing intellectual property law system. On August 1, 1993, the Beijing Higher People's Court and the Beijing Intermediate People's Court first established trial courts specifically for intellec-

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39. *Id.*, art. 47.

40. *Id.*, art. 89.

41. THE CIVIL CODE OF THE PEOPLE'S REPUBLIC OF CHINA, art. 95.

42. Hungdah CHIU, *Recent Chinese Criminal Justice Reforms.* The American Asian Review, Vol. XV, No. 2, Summer 1997, at pp. 58-59.

43. *Id.*

44. *Zhong Hua Ren Min Gong He Guo Xing Fa* (Criminal law of the People's Republic of China), Beijing: *Zhong Hua Ren Min Gong He Guo Quan Guo Ren Min Dai Biao Da Hui Chang Wu Wei Yuan Hui Gong Bao, Di Er Hao, 1997* (Gazette of the Standing Committee of the National People's Congress of the People's Republic of China, No. 2, 1997), art. 216.

45. *THE PATENT LAW OF THE PEOPLE'S REPUBLIC OF CHINA* (1992), Beijing Publishing House of Law (Chinese-English bilingual), 1994.

tual property litigations.[46] Thereafter, higher people's courts of other provinces and municipalities also set up such trial courts for intellectual property suits, these courts are now available in, but not limited to, Shanghai, Guangdong, Fujiang and Hainan, to name just a few.[47]

On January 1, 1994, China officially became a member of the Patent Cooperation Treaty (PCT) of the WIPO, indicating its gradual maturity and willingness to become an international player in the world market of patents.[48]

III. THE CHINESE PATENT SYSTEM

1. Former Soviet Patent System Abandoned, Western Systems Adopted, but Combined with China's Own Unique Rules

In the new patent system amended in 1985, China abandoned the double-track reward system that was adopted from the former Soviet Union, which granted inventor certificate and patent certificate. Building from scratch, the Chinese patent system adopted basically the patent law systems from the Western countries, mostly from the German system, but also combined its own rules to reflect the characteristics of China.

In order to meet international standards and harmonize the Chinese patent system with the Paris Convention, China adopted the Western single-track patent protection system, and for the first time, started to recognize property rights resulting from job and non-job related inventions, allowing such property rights and monopolies to be granted to the state, collective work unit or individuals.

2. Three Patent Types

There are three types of patents: invention patent, utility patent and design patent. They are all protected by the 1992 patent law.[49] The government issued the Rules for the Implementation of

46. SHEN Xiao Zen, A Discussion of How to Enhance Patent Protection in China, *supra* note 15, p. 68.

47. *Id.*

48. ZHANG Ping, Intellectual Property Law Analysis, *supra* note 21, p. 11.

49. Patent Law, art. 2., *supra* note 51.

the Patent Law of PRC to provide some insight on the definition of these patents.[50]

(1) Invention Patent

The word "invention" means "any new technical solution relating to a product, a process or an improvement thereof."[51]

Invention patent includes three major categories—

(i) Product Invention

These are man-made products that have certain special characteristics, such as a machine, equipment , or a substance. Natural objects discovered by man are not an invention, such as natural treasure stones, gems and minerals. A patent granted for this type of invention is called a "product patent." Such a patent protects only the product itself, it does not protect the process of making such a product.

(ii) Process Invention

These include a special process or a method that converts one substance into another, or a process or method that is used to make a product which has some special characteristics. This process can include a chemical process, mechanical maneuver or electronic telecommunication. A patent granted for this type of invention is called a "process patent." The 1984 Patent Law only protected the process itself; it did not protect the product made by such process. This problem was corrected by Article 11 of the 1992 Patent Law, "[a]fter the grant of the patent right for an invention, . . ., except as otherwise provided for in the law, no entity or individual may, without the authorization of the patentee, . . ., use the patented process and use or sell the product directly obtained by the patented process, for production or business purposes."[52] It further prevents products imported from abroad: "[a]fter the grant of the patent right, except as otherwise provided for in the law, the patentee shall have the right to prevent any other person from importing, without its or his authorization, the patented product, or the product directly obtained by its or his patented process, . . ."[53]

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50. *RULES FOR THE IMPLEMENTATION OF THE PATENT LAW OF THE PEOPLE'S REPUBLIC OF CHINA* (1992), Beijing Publishing House of Law, 1994.

51. *Id.*, art. 2.

52. Patent Law, art. 11, *supra* note 51.

53. *Id.*

(iii) Improvement Invention

This is an improvement over existing techniques. Most of the patents filed in China are for improvements. A patent granted for this type of invention is called an "improvement patent." These patents either provide improvements, or add new functions.

(2) Utility Patent

The word "utility" means "any new technical solution relating to the shape, the structure, or their combination, of a product, which is fit for practical use."[54]

Utility patents require a relatively lower level of technical skills or inventiveness than an "invention patent." Due to China's current technological level and its limited resources, most patents filed from within China are this type of utility patents and have been so for quite a long time. Therefore, it is predictable that utility patents will play an important role in China's efforts to develop a better patent system.[55]

A utility patent must have two characteristics—

(i) It must be a three dimensional product that is made by an industrial manufacturing process;

(ii) It must have certain shape and structure. Air, gas and electrical power are not considered to have shape and structure.

(3) Design Patent

The word "design" means "any new design of the shape, pattern, color, or their combination, of a product, which creates an aesthetic feeling and is fit for industrial application."[56]

A design patent must have the following characteristics:

(i) It is combined with a product. Here the "product" does not include hand-made crafts, agricultural products and natural products. It is not pure arts and crafts;

(ii) It is a design for the shape, pattern and color or a combination of them. The design can be two dimensional as well as three dimensional;

(iii) It has visual aesthetic effect; and

(iv) It fits an industrial application.

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54. *RULES FOR THE IMPLEMENTATION OF THE PATENT*, *supra* note 56.
55. ZHANG Ping, Intellectual Property Law Analysis, *supra* note 21, p. 51.
56. *Id.*

3. Patentability

(1) Qualifications for Invention and Utility Patents

Three characteristics are required to qualify for an invention patent or a utility patent; these three characteristics are novelty, inventiveness and usefulness.

(i) Novelty

Article 22 states that "novelty" means that, "before the filing date of the application, no identical invention or utility model has been publicly disclosed in domestic or foreign publications or has been publicly used or made known to the public by any other means in the country, nor has any other person previously filed with the Patent Office an application describing an identical invention or utility model which was recorded in patent application documents published after the said date of filing."[57]

Publication disclosure is world wide, and any such disclosure before the filing date will defeat novelty. Any publication that is supposed to be or is stamped "for internal use only," which is a popular way of disclosing information within organizations in China, as long as other people outside the designated group might obtain such publication, will also defeat novelty.

One should note however, that a "use" of such invention is treated differently than a publication disclosure. Inside China, any use of a product of such invention in public is a disclosure, even if the product of such invention cannot be disclosed without opening up or destroying the product itself. But outside China, such use is not considered to be a public disclosure. Other disclosures such as verbal discussions, radio and television announcements, exhibitions and sales promotions are all considered to be public disclosures only inside China. Therefore, such definitions might give foreign applicants an advantage.

(ii) Inventiveness

Article 22 states that "inventiveness" means that, "compared with the technology existing before the filing date of the application, the invention has prominent and substantive distinguishing features and represents a marked improvement, or the utility model

57. Patent Law, art. 22, *supra* note 51.

possesses substantive distinguishing features and represents an improvement."[58]

For an invention patent, inventiveness requires that such invention have an obvious advantage and marked difference over existing technology. Such invention should provide a solution to a problem that a particular society has wanted to resolve for a long time, or have a surprising result, or lead to a new trend of technology development.

A utility patent requires a relatively lower level of inventiveness. It only requires that the patent provide an improvement over existing technology.

(iii) Usefulness

Article 22 states that "usefulness" means that, "the invention or utility model can be made or used and can produce positive results."[59]

Generally, several conditions must be met to satisfy the "usefulness" element of an invention. First, the invention has to be industrially applicable, it can not just be an imagination. There is no limitation as to what industry the invention might apply to. Second, the invention must be repeatable by others skilled in the art without any attached random or special factor. Finally, the invention must be beneficial to society. It cannot be harmful to society, such as producing environmental pollution, grossly wasting natural resources, or being hazardous to human health.

(2) Qualifications for Design Patent

Article 23 states that "[a]ny design for which a patent right may be granted must not be identical with or similar to any design which, before the filing date of the application, has been publicly disclosed in domestic or foreign publications or has been publicly used within the country."[60]

So, for a design patent, a "publication disclosure" is worldwide; however, a "use disclosure" is only within China. The same disclosure restriction applies to invention and utility patents.

One must note that since a design patent is used for a particular product, the patent right is only limited to such type of product. If a similar design is used on a different type of product, it is not

58. *Id.*
59. *Id.*
60. Patent Law, art. 23, *supra* note 51.

considered to be the same design, and is, therefore, not an infringement.[61]

(3) Big Exceptions to "Novelty"

Article 24 states that "[a]ny invention-creation for which a patent is applied shall *not* lose its novelty if, within *six months* before the filing date of the application, one of the following events has occurred:"[62] (both emphases added).

(a) it was exhibited for the first time at an international exhibition sponsored or recognized by the Chinese government;

(b) it was made public for the first time at a prescribed academic or technical conference; or

(c) it was disclosed by any person without the consent of the applicant.[63]

One should note that the exhibitions must have been sponsored by the State Council, or ministries and commissions under the State Council, or other organizations or local government approved by the State Council.

The academic or technical conferences must have been sponsored by related authoritative organizations under the State Council or a national academic organization. They do not include organizations below the provincial level.[64]

Unauthorized disclosures include violations of non-disclosure agreements, disclosure under duress, deception, spying, or any disclosure against an applicant's will within 6 months of application.[65] This is different from many Western patent laws, under which an applicant might lose novelty and can only sue the wrongdoer for damages.

4. Adopting the German Early-Publication System

In order for the society to utilize patent technologies quickly, and allow the public to have prompt access to patent application information, and in the meantime reduce the work load of the CPO, China adopted the German system, which publishes the patent application 18 months after the filing date but before patent

61. ZHANG Ping, Intellectual Property Law Analysis, *supra* note 21, p. 57.

62. Patent Law, art. 24, *supra* note 51.

63. *Id.*

64. *RULES FOR THE IMPLEMENTATION OF THE PATENT LAW*, art. 31, *supra* note 56.

65. *Id.*

substance examination by the CPO, and the application can be published earlier than 18 months if the applicant so desires. For utility and design patents, a registration system is used that performs only formality checks on the applications. The reason China adopted this early-publication system is that China's existing technology development level still lags behind that of the developed countries; therefore, the majority of the patents filed in the near future will be for small inventions, with limited inventions in the high tech sector which can be utilized only by large companies that have more manpower and financial resources. Most small inventions, on the other hand, can be utilized by small companies and even the general public, and China has felt the need to quickly provide these small inventions to the public to benefit the society as a whole.[66] This system has been adopted by most developing nations as well.

5. Job and Non-job Related Inventions

Article 6 of the Patent Law states "[f]or a job-related invention-creation made by any person in execution of the tasks of the entity to which he belongs or by primarily using the material resources of the entity, the right to apply for a patent shall belong to the entity. For an invention-creation that is not job-related, the right to apply for a patent shall belong to the inventor or designer. After an application is approved, if it was filed by an entity owned by the whole people, the patent right shall be held by such entity. If it was filed by a collectively owned entity or an individual, the patent right shall be owned by such entity or individual."[67] This Article provides incentives to employees working for state-owned or privately-owned enterprises to do more creative work. Prior to economic reform, virtually no individual could own a monopolizing patent. The concept of an employee owning a patent would have been impossible to comprehend. The government owned everything. But today, the concept of private property such as a patent, has been generally accepted in China. It is now possible for individuals to separate patent rights that might belong to them from the government or a company, thanks to the new patent law.

With the incentives provided by the new patent law, job-related inventions have increased significantly to 25,126 applications during 1996, a 26.1% increase over 1995; also applications filed by

66. ZHANG Ping, Intellectual Property Law Analysis, *supra* note 21, p. 45.

67. Patent Law, art. 6, *supra* note 51.

enterprise entities increased even further to 20,302 applications during 1996, a 71% increase over 1995.[68]

Even with this incentive, it is difficult, however, to determine in reality what really constitutes a non-job related invention, which turns on how to interpret the patent law. The government issued the Rules for the Implementation of the Patent Law of PRC to provide some insight on this issue.[69]

Article 10 of the Rules states that a " '[s]ervice invention-creation made by a person in execution of the tasks of the unit to which he belongs' mentioned in Article 6 of the Patent Law refers to any invention-creation made:

(1) in the course of performing his own duty;

(2) in execution of any task, other than his own duty, which was entrusted to him by the unit to which he belongs;

(3) within one year from his resignation, retirement or change of work, where the invention-creation relates to his own duty or another task entrusted to him by the unit to which he previously belonged."[70]

It further states that " '[m]aterials means of the unit' mentioned in Article 6 of the Patent Law refers to unit's money, equipment, spare parts, raw materials, or technical data which are not to be disclosed to the public."[71]

Today, as reform deepens in China, more and more private enterprises and individuals own properties. Employees working for "work units" have also gained more autonomy in business operations, therefore, they should also be given comparable autonomy in the emerging markets of professional and technical services.

6. Government Grants Both Requisition and Compulsory Licenses

There are three entities in China that can own intellectual property rights: state-owned, collectively-owned (both are non-private entities) and individuals. Article 14 of the Patent Law states that "[t]he relevant competent departments under the State Council

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68. YUAN De, The Booming of Patent Applications in China, *supra* note 10.

69. *RULES FOR THE IMPLEMENTATION OF THE PATENT LAW*, supra note 56.

70. *RULES FOR THE IMPLEMENTATION OF THE PATENT LAW*, art 10, *supra* note 49. *Note*: The English translation by Beijing Publishing House of Law used both "job-related" and "service-related" interchangeably.

71. *Id.*

and the people's governments of provinces, autonomous regions and municipalities directly under the Central Government shall have, in accordance with the State plan, the power to permit designated entities to exploit important invention-creation patents held by entities owned by the whole people under the organizational system or jurisdiction of these departments and governments. The entities exploiting such patents shall, in accordance with State provisions, pay an exploitation fee to the entity holding the patent right."[72] The government thus has the power to grant planned or requisition licenses to state owned entities to exploit these important patents owned by other state owned entities. This is to promote prompt applications of these important patents under a state-organized plan.

Article 14 of the Patent Law further states that "[i]f patents held by Chinese individuals or collectively owned entities are of great significance to the interest of the State or the public and need to be applied on an extended scale, the matter shall be handled by the relevant competent department under the State Council according to the provisions of the preceding paragraph after reporting to the State Council and obtaining its approval."[73] The government thus also has the power to grant planned or requisition licenses to state owned entities to exploit these important patents owned by collective entities or individuals. But the only difference between the above two planned licenses is that the latter requires a higher standard of approval - only the State Council can have such requisition power to approve such planned license, whereas the former can be granted by governments of provinces, autonomous regions and municipalities directly under the Central Government.

Some Chinese legal experts, however, argue that such planned or requisition licenses were the result or the influence by the previous central government planned economy and were therefore contrary to the fast growing market economy in China, as well as incompatible with international treaty practices.[74] These experts predicted such planned or requisition licenses would be amended in the future.[75]

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72. Patent Law, art. 14, *supra* note 51.

73. *Id.*

74. YUAN Ying and LI Ai Qing, *Zhi Shi Chan Quan Bao Hu Bei Wang Lu* (Memorandum of intellectual property protection), Beijing: *Min Zhu Yu Fa Zhi* (Democracy and law), vol. 17, No. 250, 1997, pp. 4-7.

75. *Id.*

Many developing nations, including China, use compulsory licenses to promote the utilization of patents that have great importance to the nation's interest. Article 51 of the Patent Law states that "[w]here any entity which is qualified to exploit the invention or utility model has made a request for authorization from the patentee of an invention or a utility model to exploit its or his patent on reasonable terms and has been unable to obtain such authorization within a reasonable period of time, the Patent Office may, upon the application of that entity, grant a compulsory license to exploit the patent for the invention or utility model."[76] Note that Article 52 of the Patent Law further states that "[w]here a national emergency or an extraordinary state of affairs occurs, or where the public interest so requires, the Patent Office may grant a compulsory license to exploit the patent for invention or utility model."[77]

The conditions to grant such a compulsory license, however, are very strict. First, the applicant must have the ability to effectively utilize the patent, namely, the applicant must be able to produce, make and sell the prospect product under the patent. Second, the applicant must reasonably negotiate with the patentee, and compensate the patentee with reasonable fee. Third, the applicant must have made a request to the patentee but must have been rejected or must have not been answered within a reasonable period of time. There is no definition, though, as to what constitutes a "reasonable period of time." In practice, this is usually determined based upon the potential social effect of the patent and the practical abilities of the applicant and patentee or can be determined using the Paris Convention as a reference, namely, four years after the patent application date or 3 years after the granting of the patent.[78]

"Any entity or individual that is granted a compulsory license shall not have an exclusive right to exploit the patent in question, nor shall it or he have the right to authorize exploitation of the patent by others."[79] Thus, the patentee may negotiate another compulsory license to a third party.

Compulsory license is only limited to invention patents and utility patents, and is not applicable to design patents. Because granting compulsory licenses requires an extraordinary patent with

76. Patent Law, art. 51, *supra* note 51.

77. Patent Law, art. 52, *supra* note 51.

78. ZHANG Ping, Intellectual Property Law Analysis, *supra* note 21, p. 116.

79. Patent Law, art. 56, *supra* note 51.

strict conditions, since the new Patent Law was issued, China has not granted a single compulsory license.[80]

7. Government Administrative Authorities and People's Courts Share Jurisdiction

For historical reasons, China is still at the developing stage in its legal system as a whole, even more so for its patent system. Many courts, especially in the smaller cities or remote areas, are not equipped with qualified legal staff to process patent arbitrations and litigations. On the other hand however, government administrative organizations play important roles in intellectual property disputes including patents, because traditionally these organizations exercised both administrative and quasi-adjudicative functions. This phenomenon explains to an extent that the Chinese court system has traditionally played a weaker role than its administrative authorities because of strong central government support to administrative branches.

Article 60 of the Patent Law states that "[i]f any acts of infringement arising from the exploitation of a patent without the authorization of the patentee, the patentee or interested parties may request the administrative authorities for patent affairs to handle the matter or may directly file a suit in the people's court."[81] This suggests that both administrative authorities and courts share jurisdiction over patent disputes. Article 77 of the Rules for the Implementation of the Patent Law states that "[t]he prescribed time limit for requesting the administrative authority for patent affairs to handle patent disputes is two years counted from the date on which the patentee or any interested party is or should be aware of the affairs."[82] Accordingly, the statute of limitation for administrative arbitration is 2 years.

Article 60 of the Patent Law further states that "[i]n handling the matter, the administrative authorities for patent affairs shall have the power to order the infringer to stop acts of infringement and compensate for the losses. Any party dissatisfied with the order may, within three months from receiving notification of it, file a suit in the people's court. If, at the expiration of such period, the party has neither filed a suit nor complied with the order, the administra-

80. ZHANG Ping, Intellectual Property Law Analysis, *supra* note 21, p. 117.

81. Patent Law, art. 60, *supra* note 51.

82. *RULES FOR THE IMPLEMENTATION OF THE PATENT LAW*, art. 77, *supra* note 56.

tive authorities for patent affairs may approach the people's court for compulsory enforcement of the order."[83] This suggests that the administrative authorities are the first preferred place to seek help, not the courts, indicating the government's intention of favoring arbitration over litigation. By the end of 1993, the Chinese government had already set up over 70 patent administrative organizations nation wide, among which over 20 were under the direct supervision of the State Council.[84]

The court system is used as a last resort, reflecting a long history of strong executive power by the central government with a weak judiciary system, often exemplified by better equipped administrative authorities with more staff, more operating expenses and organizational connections. The Patent Law thus correctly recognizes and reflects the reality of the current Chinese legal system, therefore better serving patent disputes during this transitional period as China develops a stronger legal system.

8. Means for Patent Dispute

Depending upon the type of dispute, the parties can choose the forum to resolve the dispute. The following are the general means available for patent dispute:

(1) Mediation

If the disputing parties agree, they can choose a third party - a mediation party. A mediation party varies, depending upon whether the disputing parties agree to use private mediation, administrative mediation, arbitration mediation, or judicial mediation.

A private mediation party can be any individual or a work unit. An administrative mediation party can only be a patent administration department within an organization. An arbitration mediation party can only be an official government arbitration entity. This arbitration mediation process is the initial step towards full arbitration. If an agreement can be reached between the disputing parties, then no full arbitration will take place, and settlement at this level is binding. A judicial mediation party is a court. It is one of the steps in a full judicial litigation.[85] All of these means are designed to encourage settlements at all levels of patent disputes. The difference is

83. Patent Law, art. 60, *supra* note 51.

84. YUAN Ying and LI Ai Qing, Memorandum of Intellectual Property Protection, *supra* note 80, p. 6.

85. ZHANG Ping, Intellectual Property Law Analysis, *supra* note 21, p. 126.

that only arbitration and judicial mediation have binding force on the parties, whereas private and administrative mediations do not. The parties can take the arbitration and judicial approach if they disagree with the private or administrative mediation result.[86]

(2) Arbitration

Arbitration is generally limited to patent agreement disputes. The following are the government arbitration organizations:

(a) Technical Agreement Arbitration Commission (TAAC)

Technical Agreement Arbitration Commissions are generally available at the level of provinces, autonomous regions and municipalities directly under the central authority. Arbitration results are binding on all parties;

(b) Economic Agreement Arbitration Commission (EAAC)

The State Administration for Industry and Commerce and local Administration for Industry and Commerce all have Economic Agreement Arbitration Commissions. Such arbitration results, however, are not binding. Parties can appeal to their local people's court.

(c) China International Economic and Trade Arbitration Commission (IETAC)

The Foreign Trade Arbitration Commission under the China State Council for the Promotion of International Trade arbitrates patent disputes for both economic and technical agreements involving foreign parties.

(3) Administrative Sanctions

Patent administrative organizations under the State Council or under local government can invoke administrative sanctions against violating parties that are part of such government organizations, whether the violating parties are working units or individuals. But such administrative sanctions must be requested within two years from the date of alleged patent violation.[87] Dissatisfied parties can appeal to a local people's court.

(4) Judicial Action

Judicial action can be taken directly from the very beginning of a patent dispute or after an administrative mediation.

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86. *Id.*

87. Patent Law, art. 60, *supra* note 51.

(i) Directly from the beginning of a dispute

Disputing parties can directly file suit to the intermediate people's courts of the province, autonomous region, municipality or economic special zone where the dispute took place. Appeals can be filed with the higher people's court of thesejurisdictions. Relief includes injunction, damage recovery and public apology. The statute of limitation is two years from the date the violation was known or should have been known by the patentee.

(ii) After administrative mediation

After an administrative mediation, the dissatisfied party can file suit with the intermediate people's courts of the province, autonomous region, municipality or economic special zone where the dispute took place. Appeals can be filed to the higher people's court of these jurisdictions. But the statute of limitations is only three months from the date of receiving the mediation result.

(iii) File criminal suit

Article 63 of the Patent Law states "[w]here any person passes off the patent of another person, such passing off shall be dealt with in accordance with Article 60 of this Law. If the circumstances are serious, the person directly responsible shall be investigated for criminal liability by applying mutatis mutandis Article 127 of the Criminal Law."[88] According to Article 127 of the Criminal Code, persons who are directly responsible for such crimes shall be sentenced to either a fixed-term imprisonment of not more than three years in prison, detention or a fine.[89]

Article 64 of the Patent Law states "[w]here any person, in violation of the provision of Article 20 of this Law, files in a foreign country without authorization an application for a patent divulging an important State secret, ... If the circumstances of the case are serious, he shall be investigated for criminal liability in accordance with the Law,"[90] he shall be sentenced to a fixed-term imprisonment of not more than seven years in prison.[91]

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88. Patent Law, art. 63, *supra* note 51.

89. Criminal Law of PRC, art. 216, *supra* note 50.

90. Patent Law, art. 64, *supra* note 51.

91. ZHANG Ping, Intellectual Property Law Analysis, *supra* note 21, p. 128.

IV. RECENT DEVELOPMENTS

With the help of several years' practical experience by the Chinese legal society and under pressure from the international community for more compatibility, the Chinese government started to amend the 1984 Patent Law 4 years after the Law went in force. On September 4, 1988, at the 27th meeting of the seventh People's Congress Standing Committee (PCSC), the Standing Committee adopted the Resolution on the Amendment of the Patent Law, effective from January 1, 1993. These amendments drastically improved the Chinese Patent Law and reduced the distance between the Chinese patent system and those of the international community. These amendments include the following items:

(1) Added the patentee's right to prohibit the importation of goods made according to the patentee's patent for production or business purposes without the patentee's authorization.[92] The 1984 Chinese Patent Law provided the patentee with only the exclusive rights to make, use and sell for a product patent, and the exclusive right to use a process patent, but could not prohibit unauthorized importation of such patented goods. Many countries have this protection in their patent laws. By expanding this right, the Chinese Patent Law is more compatible with similar laws in the international community;

(2) Expanded protection for process patent from exclusive use only to the exclusive use and sale of product directly obtained by this patented process;[93]

(3) Expanded patent protections by reducing the original seven prohibited areas to five non-patentable territories, i.e., "for any of the following, no patent right shall be granted:

(i) scientific discoveries;
(ii) rules and methods for mental activities;
(iii) methods for the diagnosis or for the treatment of diseases;
(iv) animal and plant varieties;
(v) substances obtained by means of nuclear transformation."[94]

The original prohibitions included food, beverage, flavoring, pharmaceuticals and substances obtained through chemical

92. Patent Law, art. 11, *supra* note 51.
93. *Id.*
94. Patent Law, art. 25, *supra* note 51.

processes. The amendment lifted the ban in these areas. Now these inventions are patentable, bringing the patent law closer to international standards;

(4) Expanded the 1984 "right of priority" from the original 12 months applicable to foreign applicants only, to 12 months applicable to both foreign and Chinese applicants pursuant to a bilateral agreement, if one exists, or to the Paris Convention. Further, "where, within twelve months from the date on which any applicant first filed in China an application for a patent for invention or utility model, he or it files with the patent office an application for a patent for the same subject matter, he or it may enjoy a right of priority."[95] Thus, the amendment hast created a domestic right of priority, whether the applicant is Chinese or foreign. Moreover, within 12 months (utility patent) or 6 months (design patent) of first filing with the CPO, the applicant may request that the date of first filing be the priority or material date for his application on the same subject matter for related filings later;

(5) Expanded the scope of invention and utility model applications from the original limitation of requiring features to be stated within the initial application description to include features described in the scope of claims as well.[96] Under the 1984 Patent Law, if a feature was not included in the description, it could not be put in the claims, making amendment virtually impossible. Applicants had to resubmit a new application, thereby losing the earlier priority date. The amendment resolved this problem;

(6) Made certain that "after receiving an application for a patent for invention, if the Patent Office, upon preliminary examination, finds the application to be in conformity with the requirements of the Law, it shall publish the application promptly after the expiration of eighteen months form the date of filing."[97] The 1984 Patent Law however, would publish the application within 18 months. Under the amended law, only "upon the request of the applicant, the Patent Office may publish the application earlier;"[98]

(7) Abandoned the original announcement of preliminary approval. Under the new amendment, now "where it is found after examination as to substance there is no cause for rejection of the application for a patent . . . the Patent Office shall make a decision

95. Patent Law, art. 29, *supra* note 51.

96. Patent Law, art. 23, *supra* note 51.

97. Patent Law, art. 34, *supra* note 51.

98. *Id.*

granting the patent right . . . issue the certificate of patent . . . and register and announce it."[99] This shortens the time for granting a patent;

(8) Abandoned the original 3-month public opposition proceeding before the grant of a patent, adopted the new 6-months public revocation proceeding after the grant of a patent.[100] Under the 1984 Patent Law, no patent protection was granted during this 3-month opposition proceeding period. A patentee could not seek legal help when infringement occurred. A majority of foreign countries do not use this opposition proceeding. After 4 years of practical experience, very few opposition proceedings were ever filed.[101] The new amendment made the revocation proceeding subsequent to the grant of patent, giving a longer period (6 months) for this purpose, enabling a faster patent approval process and better opportunity for the public to inspect the patent;

(9) Added a Patent Reexamination Board (PRB), "where any party is not satisfied with the decision of the Patent Office rejecting the application, or the decision of the Patent Office revoking or upholding the patent right, such party may, within three months from the date of receipt of the notification, request the Patent Reexamination Board to make a reexamination."[102] This amendment gives a patentee a right to appeal to the PRB;

(10) Under the 1984 Patent Law, the duration of a patent right for an invention patent was 15 years; utility and design patents were 5 years; and all could be renewed for another 3 years. The amendment extended the patent rights duration to 20 years for an invention patent, and 10 years for utility and design patents. No extension is allowed.[103] The reason for granting longer durations of patent rights is that some invention patents, especially in the areas of pharmaceuticals, chemical substances and bio-technologies, involve large investment, long turn-around cycles, product marketing and testing and certification processes. In order to gain a market advantage, patents are usually filed before these processes take place, but products often are not ready until long after patents have been granted, thus losing part of the precious protection duration.

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99. *Supra* note 44, Patent Law, art. 39 and 40.

100. Patent Law, art. 41 and 42, *supra* note 51.

101. LI Qiang, *Zhi Shi Chan Quan De Fa Lu Bao Hu* (The legal protection of intellectual property rights), Beijing: *Zhong Guo Zheng Fa Da Xue Chu Ban She* (China University of Political Science and Law Press), 1995, p. 14.

102. Patent Law, art. 43, *supra* note 51.

103. Patent Law, art. 45, *supra* note 51.

The amendment extended the protection period, thus giving more incentive to industries as well as to foreign investment by their advanced technologies. The extension also fulfills the Paris Convention supplementary treaty requirement;

(11) Set up time limitations for any entity to challenge a patent right. Under the 1984 Patent Law, any entity can start the opposition proceeding by filing a request to the PRB anytime immediately after the grant of the patent. The new amendment allows such challenge only 6 months after the grant of the patent.[104]

However, "where any party is not satisfied with the decision of the Patent Reexamination Board either invalidating or upholding the patent right for an invention, it may, within three months after receiving notification of the decision, file a suit in the people's court."[105] This right of appeal to court is only limited to invention patents, and is not available for utility or design models. "The decision of the Patent Reexamination Board on a request to invalidate the patent right for a utility model or design shall be final;"[106]

(12) Loosened the condition for a compulsory license and lifted the time limitation to apply such a license. Now a compulsory license can be granted, if conditions permit, at any time after the grant of patent.[107] Also strengthened is the power for the government to issue a compulsory license "where a national emergency or an extraordinary state of affairs occurs, or where the public interest so requires, . . . ;"[108]

(13) Added both civil and criminal sanctions for passing off a patent. Under the 1984 Patent Law, sanctions were used only for infringing on a patent. But in reality, only a few entities could actually copy the patented technologies due to an infringer's limited resources. Even worse, most violators made their own subclass products but claimed their products were the result of a patentee's patent.[109]

V. CASE ANALYSES OF PATENT LITIGATION IN CHINA

It is conceivable to the author that some foreign owned patents might be, or already have been infringed on or violated in China.

104. Patent Law, art. 48, *supra* note 51.
105. Patent Law, art. 49, *supra* note 51.
106. *Id.*
107. Patent Law, art. 51 and 52, *supra* note 51.
108. *Id.*
109. ZHANG Ping, Intellectual Property Law Analysis, *supra* note 21, p. 48.

This possibility is quite large at some lower level of foreign patented technologies whose implementations do not involve big financial investment, high tech manufacturing equipment, complex computer chips or highly sophisticated computer software programs. These foreign patents could include inventions involving small medical devices, small electronic appliances or small machinery, to name a few. The author however, with limited resources and availability to published case materials released by the Chinese government, found only a few patent dispute cases involving, either directly or indirectly, both Chinese and foreign parties.

This phenomenon might be explained by (1) the present big gap between the technological differences of China and developed nations, because most of the highly advanced technologies are purchased outright, instead of being manufactured or infringed on in some way by Chinese industry or the potential Chinese competitors. Such high tech products include airplanes, computer chips, medical imaging devices and pharmaceuticals; (2) the actual difficulty of discovering an infringement or patent violation in China by foreign patent owners, despite the fact that some foreign companies have local offices in China; (3) the lack of confidence and trust by foreigners in the Chinese legal system, especially in the area of IPR. Suing a Chinese patent violator by a foreign patent owner in China therefore may be viewed as impractical. Worse yet, the enforcement of such suit in China may be an even bigger dilemma to foreign entities.

1. Pre-Existing U.S. Patents Are Prior Arts to Inventors in China, Barring Similar Patent Applications in China—*WANG & WANG v. CPO* [110]

This case illustrates the very possibility of patent infringement mentioned in this section.

Appellant-plaintiffs (applicants), WANG & WANG, submitted their patent application to Appellee-defendant, the CPO, on April 9, 1985, for an invention patent titled "Fast Pancake Cooking Device." The CPO rejected their application for lack of inventiveness and technical characteristics in light of a U.S. invention, "Multiple

110. GAO Yian and WANG Xiang Rong, *Zhuan Li Fa Li Jie Shi Yong Yu An Li Ping Xi* (Appropriate understanding of patent law and case analysis), Beijing: *Ren Min Fa Yuan Chu Ban She* (People's Court Press), 1996, pp. 275-283. *Note*—no precise case name or case number was provided in this book.

Saucer Sandwich Cooking Device," under U.S. patent No. 4,297,941, issued to one Denise Gallina on November 3, 1981.[111]

The U.S. patent claimed:

"A multiple saucer sandwich cooking oven comprising a base plate having a first plurality of sandwich sized mold indentations therein, a top plate pivotally mounted to said base plate having a second plurality of sandwich sized mold indentations therein corresponding to said first plurality of indentations in number and positioning, heating means connected to said top and base plates, said first and second plurality indentations define a plurality of sandwich molds there between when said top plate is pivoted into its closed position with said base plate, whereby said heating means is activated for cooking a sandwich assembly positioned within each of said sandwich molds . . . said heating means comprising resistance electric heating elements, . . . and said heating element further comprising a timer for setting the heating element. . ."[112]

After the rejection, the applicants immediately requested a reexamination by the PRB. In the reexamination process, the PRB pointed out the problems of the applicants' claims and suggested some changes, but the applicants refused to make such changes. Instead, they started the review process that dragged out for more than 4 years. In their last request to the PRB on August 29, 1989, they attempted to stress the differences between their invention and that of the U.S. patent. The applicants claimed:

"(1) A fast pancake cooking device, comprising a top plate and a base plate, affixed inside each said plate is a surface, heated by an electrical or gas heating device. The said two heating surfaces hold pancakes to be cooked. The said top plate is vertically placed above the said base plate, with the said top plate having a bigger diameter than the said base plate, enclosing the said base plate and secured by the weight of the said top plate;

(2) A wire tube is connected to the top portion of the said top plate, the said wire tube can slide inside a rotating support stand."[113]

But the PRB again rejected the application. The PRB pointed out that the only difference between the applicants' claims and that

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111. Denise Gallina, *Multiple Saucer Sandwich Cooking Device*, U.S. Patent No. 4,297,941, issued on November 3, 1981.

112. *Id.*, Claim 1.

113. *Supra* note 116, p. 275. Translation provided by author. Since the actual Chinese patent was not available to the author, the precision of the author's translation is limited.

of the U.S. patent is that the applicants claimed "the said top plate is vertically placed above the said base plate, with the said top plate having a bigger diameter than the said base plate, enclosing the said base plate and secured by the its weight of the said top plate." The PRB ruled this difference as "non-substantial" and "non-inventive."[114] The PRB further pointed out that, in light of the U.S. patent, an ordinary person skilled in the art can easily modify the U.S. patent by changing the vertical distance between the top and base plates, letting the top plate sit on the base plate secured by weight, thus converting the U.S. patented "Multiple Saucer Sandwich Cooking Device" into the applicants' "Fast Pancake Cooking Device." Such difference, as the PRB ruled, neither satisfied the "inventiveness" requirement in Article 22, nor satisfied the invention "scope" requirement in Article 26 of the Patent Law.[115]

On January 2, 1990, the PRB made its rejection final. The applicants filed suit in their local intermediate people's court.[116]

On December 28, 1991, the intermediate people's court held that the applicants' invention was "obvious" in light of the U.S. patent, which constituted "public knowledge," and the court affirmed the PRB's decision that the applicants' invention lacked "inventiveness."[117]

The applicants appealed to their local higher people's court. The higher people's court reversed the decision based on a procedural error by the PRB and intermediate people's court and remanded back to the PRB for further reexamination and ordered the PRB to give its determination within 3 months.[118]

After correcting the procedural error, on June 5, 1993, the PRB again delivered its rejection. The applicants filed suit to the intermediate people's court which subsequently affirmed the PRB's decision. The applicants then appealed to the higher people's court, but this time, the court affirmed the decision of the intermediate people's court.

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114. *Id.*, p. 276.

115. *Id.*

116. *Note*: The book author did not specify the actual city in which the particular intermediate people's court was located. The author of this paper did not have the actual case materials available.

117. See supra note 116, p. 277.

118. *Id.*

Case Analysis—

The above analysis by the PRB, the intermediate and higher people's courts were all in conformity with the U.S. patent statute.

First, the courts used the "novelty" test under Article 22 of the Patent Law to derive the concept of "public knowledge"—words not directly used in the Patent Law. Article 22 required that "before the filing date of the application, no identical invention or utility model has been publicly disclosed in domestic or *foreign publications*."[119] (emphasis added). The courts correctly referred to the existing U.S. patent as a "foreign publication," thus barring a similar patent application in China. This is extremely similar to the U.S. patent statute's "prior art" theory. Under 35 U.S.C. § 102, "[a] person shall be entitled to a patent unless—(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a *foreign* country, before the invention thereof by the applicant for patent."[120] (emphasis added).

Second, the courts also used the concept of "obvious to . . . an ordinary person skilled in the art"—again, words not directly used in the Patent Law. Article 22 stated that "[i]nventiveness means that, compared with the technology existing before the filing date of the application, the invention has prominent and substantive distinguishing features and represents a marked improvement, or the utility model possesses substantial distinguishing features and represents an improvement."[121] The courts interpreted this "inventiveness" test as having an implied meaning, namely, the correct standard is to compare the technology sought to be patented with that previously existing and obvious to ordinary technical personnel skilled in the art.[122] This is also extremely similar to the U.S. patent statute's "obviousness" theory. Under 35 U.S.C. § 103, "[a] patent may not be obtained though the invention is not identically disclosed or described . . ., if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole *would have been obvious* at the time the invention was made to a *person having ordinary skill in the art* to which said subject matter pertains."[123] (both emphases added).

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119. Patent Law, art. 22, *supra* note 51.

120. 35 U.S.C. § 102(a).

121. Patent Law, art. 22, *supra* note 51.

122. GAO Yian and WANG Xiang Rong, Appropriate Understanding of Patent Law and Case Analysis, *supra* note 116, p. 280.

123. 35 U.S.C. § 103.

In this case, the Chinese courts used two "derived" concepts, namely, "public knowledge" and "obvious to . . . an ordinary person skilled in the art," which are parallel and extremely similar to the U.S. patent statute's "prior art" and "obvious to . . . a person having ordinary skill in the art" under 35 U.S.C. §102 and §103, respectively, to assess patentability. A case like this would most likely be decided the same way in the United States.

However, although the higher people's court affirmed the rejection of the applicants' patent application, the issue of an injunction for manufacturing such "Fast Pancake Cooking Device" was left unaddressed. It is not known to the author whether such "fast pancake cooking devices" might be, if in fact they have not already been manufactured in China by the very applicants or others, without notification to or authorization from the U.S. patent owner. Making such a notification to or seeking permission from the U.S. patent owner, at the very least, would have been an easy and appropriate thing to do in light of the litigation, during which the very source of such pre-existing U.S. patent had been clearly identified. Manufacturing such devices would constitute a possible patent infringement of the above-mentioned U.S. patent (No. 4,297,941). However, even if such an infringement did happen in China, the foreign patent owner's lack of knowledge of such infringement would make it difficult to sue a Chinese infringer in China, because of the long time delay that either has caused the statute of limitations to run, or has estopped the foreign patent owner from suing for not taking prompt legal action against the infringer.

On the other hand however, to be fair to all, such a situation could also happen in the United States. The U.S. applicant however, may have a better chance in a U.S. jurisdiction to contest the priority of a foreign patent, if disclosed in the U.S. application process, because the U.S. patent statute uses a "first to invent" priority, not "first to file" as China and many other nations do. This may give a U.S. applicant an advantage because it may create a longer retrospective time span in a priority suit.

2. Chinese Courts Do Provide Injunctions and Monetary Relief to Foreign Patent Owners Against Chinese Infringers— *Duo Dui Duo International v. Fu Wei Cooling & Heating Co.*[124]

Plaintiff Duo Dui Duo International (Duo International) was an Australian company. On August 15, 1985, Mr. David KANG filed an invention patent application (no. 85,106,145) to the CPO. The patent application relates to a combination cooling system (DZW-110) and was subsequently granted. On January 8, 1992, Duo International acquired the patent rights from Mr. KANG. This patent also required the certifications of the American Society of Mechanical Engineers (A.S.M.E.) and Electronic Testing Laboratory (E.T.L.). Duo International also applied a similar paten in 43 other countries. Inside China, only one Chinese company, Fan Ou Efficient Energy Cooling & Heating Equipment Co. (Fan Ou), which was not a party to the suit, had acquired legal license to use this patented technology. Defendant Fu Wei Cooling & Heating Co (Fu Wei), a cooling system manufacturer in Shen Zheng City, was found to have manufactured and sold the patented products inside China since 1992, without acquiring Duo International's authorization or legal license. Duo International subsequently sent defendant's sample products to the Shen Zheng City Bureau of Technology Supervision and Shen Zheng City Institute of Product Quality Control, for determination of its technical characteristics. Both the Bureau and the Institute found that defendant's products closely resembled Duo International's patent. According to Article 60 of the Patent Law, "[i]f any acts of infringement arise from the exploitation of a patent without the authorization of the patentee, the patentee or interested parties may . . . directly file a suit in the people's court,"[125] Duo International subsequently filed suit in the Shen Zheng Intermediate People's Court.

Defendant Fu Wei did not answer the suit in court or dispute the alleged facts in any other way. The court held the facts true as alleged. According to Article 11 of the Patent Law, "[a]fter the

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124. *Duo Dui Duo International v. Shen Zheng Fu Wei Cooling and Heating Co.*, Shen Zheng Intermediate People's Court, 1995. *Note*—this case was reported in *Zui Gao Ren Min Fa Yuan Gong Bao* (PRC Supreme People's Court Gazette), vol. 1, 1995. There is no precise citation of the original case in this Gazette as to the case decision date. The Gazette did not provide the English name of the Australian company, and merely used the Chinese characters resembling the phonetics of the English name. "*Duo Dui Duo*" is the Chinese *pinyin* of the company's English name.

125. Patent Law, art. 60, *supra* note 51.

grant of the patent right for an invention . . ., except as otherwise provided for in the law, no entity or individual may, without the authorization of the patentee, make, use or sell the patent product, . . ., for production or business purposes."[126] The court ruled that Fu Wei's conduct constituted a patent violation of plaintiffs' patent.

The defendant however, agreed to settle the case with Duo International. On June 7, 1994, an agreement was reached as to the following:

(1). Defendant agreed to an injunction, and

(2). Defendant will pay plaintiff RMB¥226,990 for alleged damages.

Case Analysis—

In this case, the foreign company won the suit in China against a Chinese company, and a satisfactory settlement was reached. This case indicated that it is possible for a foreign patent owner to protect its intellectual property rights in China. The fact that the Chinese defendant company was finally willing to settle with the foreign company, instead of ignoring the suit as it did at the very beginning, demonstrated the improved awareness and respect to IPR by the Chinese industrial community, as well as the improved respect for the Chinese court system as a whole.

In fact, the Chinese courts have handled increasingly more intellectual property disputes than ever, manifesting a marked awareness of utilizing legal power by the Chinese community to protect or resolve intellectual property issues, a phenomenon not seen before the establishment of the new patent law. On July 16, 1997, at a press conference by the China Supreme People's Court, a summary was given of current intellectual property cases.[127] The summary stated that: (1) there has been a drastic increase of intellectual property related cases. From January 1996 to May 1997, people's courts in all China handled 5,296 intellectual property cases. The number of cases for 1996 increased 11.8% over 1995. The first 5 months of 1997 saw an increase of 15.3% over the first 5 months of 1996; (2) most cases happened in areas with better economic and scientific development levels; and, (3) these cases became more complicated and involved with more difficult legal

126. Patent Law, art. 11, *supra* note 51.

127. YUAN Ying and LI Ai Qing, Memorandum of Intellectual Property Protection, *supra* note 80, p. 4.

issues.[128] The number of future cases and the complexity in both factual and legal issues are expected to increase, thus demanding more attention and knowledge from the existing Chinese court system.

3. Chinese Courts Now Grant Non-job Related Inventions, An Impossibility Before the New Patent Law— *Beijing Boilers Co. v. PAN Dai Ming*[129]

Appellant-defendant, Mr. PAN Dai Ming (PAN), was a former employee of Appellee-plaintiff, Beijing Boilers Co. (Boilers). Boilers is a state owned boiler manufacturing company for which PAN used to work as an automobile driver.

Boiler alleged that in April 1980, it started an energy saving research project on its boiler products. This project was aimed at (1) improving boiler structure, and (2) utilizing improved assembly technology. Boilers alleged that it arranged for PAN, as a non-technical employee, together with four other Boilers engineers, to form this research team. Boilers alleged that this team used both time on the job and off the job to develop a research plan, which was subsequently approved by the Boilers.[130] On April 20, 1980, this plan was first tested on an 800-ton water pressure boiler, and then on a 2,500-ton water pressure boiler. The results were satisfactory.

Four years later, on October 15, 1984, the Bureau of Energy of the State Economic Commission entrusted the Beijing Energy Saving Office to organize a technical appraisal on this project, which was proven by the appraisal as providing good energy savings, and remarkable technical and economical benefits, and thus was worth expanding into nationwide utilization.

Allegedly, on April 1, 1985, PAN, with the erroneous help of Boilers, filed a non-job (also called "non-service") related invention patent application, which was granted on March 3, 1988 (patent. no. 85,102,032).

The Beijing Intermediate People's Court held that this patent was the result of the particular team research project, utilizing employees' work time and Boilers' financial resources and equipment. According to Article 6 of the Patent Law, this should have been a job-related invention. The court dismissed PAN's claim that he had

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128. *Id.*

129. *Beijing Boilers Co. v. PAN Dai Ming,*, reported in *Zui Gao Ren Min Fa Yuan Gong Bao* (PRC Supreme People's Court Gazette), vol. 3, 1995, pp. 102-105.

130. *Id.*, p. 103.

formed the inventive idea as early as during the 1970s on his own time and using his own financial resources. The court viewed PAN's evidence as unconvincing enough to substantiate his claim. The court, however, allowed PAN to keep the profits he had already made from the patent, allowed PAN to remain as the inventor and, ordered Boilers to reimburse PAN the cost and time for filing the patent (RMB ¥20,000), but granted patent ownership to Boilers.[131]

PAN appealed to the Beijing Higher People's Court. He claimed: (1) the two-year statute of limitations had run, because the patent was granted on March 3, 1988, and the suit was filed on March 8, 1990; (2) the court was asked only to decide whether the invention was job or non-job related, but changed the issue into who should own the patent ownership, and therefore exceeded the scope of the matter; and (3) PAN was the original inventor of the patent in dispute.

The Beijing Higher People's Court found that on February 10, 1989, PAN filed a patent infringement suit in the Beijing Intermediate People's Court against Beijing *Ba Bu Ke Er* Company, a joint venture between Beijing Boilers and the U.S. *Ba Bu Ke Er* Company.[132] In this suit, Beijing Boilers was joined as a co-defendant.

During this infringement suit, Boilers on March 8, 1990 filed a suit to change the patent from a non-job related into a job-related invention. The Beijing Intermediate People's Court dismissed PAN's patent infringement suit against the China-U.S. joint venture, on the basis that only after it is clear who owned the patent could the court determine if an infringement occurred.[133] The court instead accepted the case filed by Boilers against PAN. On October 20, 1992, Boilers delivered its written statement claiming its patent ownership on the theory of job-related invention under Article 6 of the Patent Law.

The Beijing Higher People's Court also found that the Boilers (1) had financed the research project; and, (2) whether PAN used his work time for the project could not be substantiated by the Boilers' evidence. Indeed, the Boilers could not produce any credible evidence on those issues. The limited evidence that the Boilers did provide was found irrelevant by the court.

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131. *Id.*

132. *See supra* note 135, p. 104. *Note*—The Gazette did not provide the English name of the U.S. company, and merely used the Chinese characters resembling the phonetics of the English name.

133. *Id.*

PAN, on the other hand, produced evidence that in the late 1970s, he had presented a technical plan called "selection optimization," which he had reduced to practice and implemented the invention himself before 1980. He utilized the invention in different fields, such as for road paving, laying under ground cables, automobile transportation and so on for different companies. The court held that PAN had perfected his invention by utilizing other companies' facilities and resources, but those companies were not parties to the suit. He later persuaded the Boilers to convert his invention for the use in the Boilers' water pressure boilers. The Boilers appointed PAN as the leader for this project, which later proved to be a big success. The Boilers openly appraised PAN in depth, which was documented by the Boilers' publications.

The Beijing Higher People's Court held that the completion of a concept for a technical solution does not necessarily depend on its perfection through actual application. Therefore, the time the conception of a technical solution is completed may precede the time the technical solution becomes perfected through actual application.[134] So, the court held that the completion of conception is not the same thing as its reduction to practice.[135] The court ruled that PAN had already finished his conception of the invention before 1980, except that he could not reduce it to practice on actual boilers for practical reasons. PAN put the invention originally in different fields, and never used the Boilers' financial resources or the Boilers' non-public data. The 1980 test on the 800 and 2,500-ton water pressure boilers was the only actual application of PAN's invention. The Boilers' equipment did not contribute to the conception of the invention. According to Article 6 of the Patent Law, the Beijing Higher People's Court held that this was a case of a non-job related invention, and therefore PAN was the rightful owner of the patent.[136]

Further, the court agreed with PAN on the issue of the application of the statute of limitations. The court held that even if the Boilers could prevail on the issue of a job-related invention, the two-year statute of limitations had run, because the statutory period started running from the date when the patent was issued, which was March 3, 1988, and the Boilers did not file suit until March 8, 1990. Therefore, the Boilers' claim was also dismissed as untimely.

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134. *Id.*

135. *Id.*

136. *Supra* note 135, p. 105.

In short, the Beijing Higher People's Court (1) reversed the decision of the Beijing Intermediate People's Court; (2) dismissed the Boilers' suite; and, (3) awarded PAN attorney's fees from the Boilers.

Case Analysis—

Under the holding in this matter, an employee inventor should demonstrate as early as possible the date of completion of the invention, including the date of its reduction to practice. In this case, the plaintiff did reduce his invention to practice, although in different areas and for different applications. Obviously, the plaintiff in this case perfected his invention by utilizing other companies' facilities and resources, but those companies were not parties to the suit. These applications completed his invention process. Unfortunately for his employer, any financial investment provided by the Beijing Boilers after that date to further perfect the invention, albeit for a different application, may be considered only for "implementation" purposes, and therefore is considered unrelated to the completion of the invention.

This ruling is basically in accord with the U.S. patent statute. Under 35 U.S.C. §102(g), an inventor is required to reduce the invention to practice and cannot abandon his invention before the reduction to practice is achieved.[137] Usually an inventor's reasonable diligence through experiment will prove his non-abandonment of the invention. This is especially helpful if the time duration between the conception of the invention and reduction to practice is a long period. The plaintiff in this case continued to test his invention in other fields with different companies, eventually perfecting his invention before demonstrating it to his own employer. No abandonment occurred.

The Chinese patent law, however, seems to be more strict than the U.S. patent statute on the issue of determining job or service-related inventions. Article 6 of the Patent Law stated that "[f]or a job-related invention-creation made by any person in execution of the tasks of the entity to which he belongs or by *primarily using the material resources of the entity*, the right to apply for a patent shall belong to the entity." (emphasis added). Namely, if the invention was completed by primarily using the employer's resources, the employee inventor will have no chance of owning anything, even if his job was not to invent. The Chinese patent law seems to be more

137. 35 U.S.C. §102(g).

rigid on the issue of patent ownership and it might be categorized as an all-or-none rule. On the other hand, the U.S. patent statute is more flexible and more lenient to an employee inventor.

Under the U.S. patent statute, an employee inventor may still acquire patent ownership of an invention completed on his job, even if, with the employer's permission, he used his employer's resources for the completion of the invention, as long as his job was not to invent and no express contract existed between the employee and employer to assign all rights to the employer. The employer, however, would be given an equitable non-exclusive "shop right," namely, the employer could use the invention without paying a fee, but the employer cannot further assign such rights to a third party. In *United States v. Dubilier Condenser Corp.*,[138] two employees of the Bureau of Standards were held by the United States Supreme Court to have patent ownership in their invention completed during their employment with the government employer, even though the employees used the employer's time and resources to complete their invention.[139] The Supreme Court held that since the employees were not hired to invent, the invention was not related to their jobs, and they received no instructions or technical help from the employer, they could retain the patent. Notwithstanding the fact that the employer provided time and resources, it could only have a "shop right" to use the invention without paying a fee; the government cannot further assign or license the invention to a third party. The patent ownership was held to belong to the employee inventors.[140]

However, in *Filmtec Corp. v. Allied-Signal*,[141] an employee inventor was held not to have any patent ownership in an invention he completed while on his job because he had signed an employment contract assigning all rights of any invention to the United States government.[142] Thus, an employee's ownership in his invention can be entirely assigned away under his employment contract, assuming the employment contract is not entirely unconscionable.

Nonetheless, the Beijing Boilers case certainly demonstrated that the Chinese courts are willing to protect intellectual property rights of a private individual notwithstanding the possibility of impinging upon a state-owned enterprise. This may sound rudimen-

138. *United States v. Bubilier Condenser Corp.*, 289 U.S. 178 (1933).
139. *Id.*, p. 196.
140. *Id.*, p. 209.
141. *Filmtec Corp. v. Allied-Signal, Inc.*, 939 F.2d 1568 (Fed. Cir. 1991).
142. *Id.*, p. 1573.

tary to Westerners, but it may not be to the Chinese. Before Chinese reform, no one in China could own property, and the state owned everything. Filing a suit against a state enterprise for a monopolizing right was beyond comprehension. However, even with today's improvements, more often than not, courts in Beijing have mistakenly found non-job related inventions to be job related inventions.[143] Some courts in remote cities have even filed criminal charges against inventors who claimed non-job related inventions.[144] Nonetheless, the concept of IPR, or private property rights as a whole, has slowly started taking root in China.

4. Using Another's Patent for Scientific or Experimental Purposes Cannot be Extended to Making or Selling Patented Products— *LU Zheng Ming v. Shanghai Construction Equipment Company et al.*[145]

In this patent infringement suit, Appellant-plaintiff, LU Zheng Ming (LU) appealed to the Shanghai Higher People's Court a decision by the Shanghai Intermediate People's Court in favor of Appellee-defendants, Shanghai Construction Equipment Company (Shanghai Construction) and Environmental Health Engineering Factory of City of Wu Xi (Wu Xi Environmental).

On March 28, 1989, the CPO granted LU a utility model patent titled "A Combination Garbage Sifting and Crushing Device" (patent no. 87,207,485). On April 8, 1989, defendant Wu Xi Environmental entrusted co-defendant Shanghai Construction to do a research project on garbage sifting and processing, about half a month after the grant of LU's patent. Four months after, in August of the same year, the defendants' new device was put into use. In order for the court to understand the differences between the defendant's device and LU's patent, the Shanghai Intermediate People's Court entrusted the Shanghai Technology Consulting Service Center to compare the two devices. The Center concluded that the technical methodologies of defendants' device were covered by

143. ZHENG Cheng Si, *Zhong Guo Zhi Shi Chan Quan Fa: Te Dian, You Dian Yu Que Dian* (The characteristics, strong and weak points of Chinese intellectual property law), Beijing: *Zhong Guo Ren Min Da Xue Shu Bao Za Zhi Zhong Xin* (China People's University Book and Newspaper Materials Center), vol. 3, 1994, pp. 71-81.

144. *Id.* p. 75.

145. *LU Zheng Ming v. Shanghai Construction Equipment Co. and Environmental Health Engineering Factory of City of Wu Xi*, reported in *Zui Gao Ren Min Fa Yuan Gong Bao* (PRC Supreme People's Court Gazette), vol. 4, 1993, pp. 163-164.

LU's claims in his patent. The Intermediate People's Court, however, did not think this similarity had constituted a patent infringement because it agreed with the defendants that their use was only for scientific and experimental purposes.[146] It held that, according to Article 62 of the Patent Law, "[n]one of the following shall be deemed an infringement of a patent right: . . . (5) use of the patent in question solely for the purposes of scientific research and experimentation."[147]

LU appealed to the Shanghai Higher People's Court. LU claimed that the Intermediate People's Court erred on the issue of what constitutes a use for "scientific and experimental purposes," because, as LU alleged, after the "scientific and experimental" use, the defendants started manufacturing, using and selling these devices. This was beyond the "scientific and experimental purposes" and constituted an infringement of LU's patent.[148]

The Shanghai Higher People's Court agreed with LU. It held that the evidence demonstrated that the defendants did use the same techniques claimed by LU in his patent. It further held that the correct understanding of Article 62 of Patent Law for the use of the patent "solely for the purposes of scientific research and experimentation" should be that such "use" is only limited to laboratory conditions, for the purpose of discovering new inventions based upon the existing patent, or to demonstrate the efficacy of the existing patent. Any extension of such use, for instance, making or selling a device that utilizes the patent in question would constitute an infringement. This was, the court held, exactly what the defendants did.[149]As a result, LU's patent rights were violated and the defendants should be held liable for such act.

Finally, the Shanghai Higher People's Court (1) reversed the decision of Shanghai Intermediate People's Court; (2) held the defendants liable to compensate LU for his financial loss; and, (3) ordered defendants to pay the fee incurred by the Technology Consulting Service Center for doing the technical comparison study.

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146. *Id.* p. 164.

147. Patent Law, art. 62(5), *supra* note 51.

148. *LU Zheng Ming, supra* note 151, p. 164.

149. *Id.*

Case Analysis—

This case could have come out the same way under the same facts if it happened in the United States. Unlike the Chinese Patent Law, which clearly defined in Article 62 that "use of the patent in question solely for the purpose of scientific research and experimentation" does not constitute an infringement,[150] the U.S. patent statute does not provide such a general exemption. 35 U.S.C. §271(a) states "[e]xcept as otherwise provided in this title, whoever without authority makes, uses or sells any patent invention, within the United States during the term of the patent thereof, infringes the patent."[151] Despite this absolute language, U.S. courts have long recognized, at least in principle, that a purely "experimental use" of a patented invention, with no commercial purpose, should be exempt from infringement liability.[152]

Experimental use had its origins in U.S. Supreme Court Justice Story's opinion in *Whittemore v. Cutter.*[153] In that case, the defendant appealed a jury instruction, to the effect that the "making of a machine . . . with a design to use it for profit" constituted infringement. Justice Story upheld the trial judge's instruction, and stated that "it could never have been the intention of the legislature to punish a man who constructed such a machine *merely for philosophical experiments*, or for the *purpose of ascertaining the sufficiency* of the machine to produce its described effects."[154] (both emphases added). Other cases followed, generally limiting the exception to quite narrow grounds in a very restrictive manner.[155]

In these cases, courts have sustained the defense of experimental use against charges of infringement only when the alleged infringer realized no economic gain from the experimental activity.[156] When courts allowed the experimental use defense, courts have inadequately detailed their reasons for upholding the defense. While case law is unclear as to when courts should apply the exception, it is apparent that U.S. courts have rarely sustained the pleas for ex-

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150. Patent Law, art. 62(5), *supra* note 51.

151. 35 U.S.C. §271(a).

152. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. Chi. L. Rev. 1017, at 1018-1019 (1989).

153. *Whittemore v. Cutter*, 29 F. Cas. 1120 (C.C.D. Mass. 1813) (No. 17,600).

154. *Id.*

155. Jordan P. Karp, *Experimental use as patent infringement: the impropriety of a broad exception*, 100 Yale L.J. 2169, 2169 (1991).

156. *Id.*, p. 2172.

perimental use.[157] U.S. courts rely on phrases like "experimental activity" and lack of "direct economic gain" to justify their allowances of the exception but have not defined these phrases with any particularity. The case law in the United States is simply ambiguous as to what conditions are necessary for allowance of experimental use as a defense.[158]

One should note however, that the U.S. patent statute does allow only one clearly defined "experimental" use for drug marketing purpose. In *Roche Prods v. Bolar Pharmaceutica*,[159] the defendant, Bolar, engaged in allegedly infringing acts prior to the expiration of plaintiff's patent in order to facilitate Food and Drug Administration (FDA) testing so as to be ready to market the drug as soon as the patent expired. The Federal Circuit held that "Bolar's intended 'experimental' use was solely for business reasons and not for amusement, idle curiosity, or philosophical inquiry. . . . Bolar may have intended to perform 'experiments,' but unlicensed experiments conducted with a view to the adaptation of the patented invention to the experimenter's business is a violation of the rights of the patentee to exclude others from using his patented invention."[160]

This decision was almost immediately superseded through legislation by 35 U.S.C. §271(e)(1), which was first applied in *Scripps Clinic v. Baxter Travenol Laboratories*.[161] Defendant Baxter used a process claimed in plaintiff Scripps'patent to obtain Factor VIII:C, a blood clotting component used to treat hemophilia, prior to the expiration of *Scripps'* patent. The court concluded that 35 U.S.C. §271(e)(1) was added to the patent laws in order to legislatively overrule *Roche Prods. v. Bolar Pharmaceutical.* It was added to the patent laws as part of the Drug Price Competition and Patent Term Restoration Act of 1984.[162] Title 35, U.S.C. § 271(e)(1) states that "[i]t shall not be an act of infringement to make, use, or sell a patented invention . . . *solely for uses* reasonably related to the *development and submission of information* under a Federal law which regulates the manufacture, use, or sale of drugs."[163] (both emphases

157. *Id.*

158. Eisenberg, *supra* note 151, p. 1019.

159. *Roche Prods., Inc. v. Bolar Pharmaceutical Co.*, 733 F.2d 858 (Fed. Cir. 1984).

160. *Id.*, p. 863.

161. *Scripps Clinic and Research Foundation v. Baxter Travenol Laboratories Inc.*, 7 U.S.P.Q.2d 1562 (1988).

162. Drug Price Competition Act, Pub. Law 98-417 (1984).

163. 35 U.S.C. §271(e)(1).

added). This creates an exception to the general rule that anyone who "makes, uses or sells any patented invention . . . infringes the patent."[164] This clear "experimental" use exception was created because FDA requires a great deal of testing concerning the safety and efficacy of a drug before allowing it to be marketed; the process can take as long as 7 to 10 years. Title 35, U.S.C. § 271(e)(1) allows scientists to use a patented product or process to gather data and submit them to the FDA in order to obtain regulatory approval to market a drug at a later time, after the patent on the drug expires. The scope of exempt subject matter under §271(e) has been interpreted to cover medical devices as well.[165]

5. Passing-off Unpatented Products as Patented Products Is Now Actionable under the 1992 Patent Law— A Remedy Not Available under the 1984 Patent Law.— *GUO Li Wen at al. v. Gao Chun County Lighting Company et al.*[166]

Plaintiff, GUO Li Wen (GUO), was the former general manager of co-plaintiff, Harbin Magnetic Device Factory (Harbin Magnetic) in Helongjiang province. Defendant, Gao Chun County Lighting Company (Gao Chun Lighting) in Yunnan province, was a manufacturer of lighting devices utilizing ceramic materials.

On August 16, 1989, the CPO granted GUO a patent that relates to the invention of a magnetic cup which utilizes a strong H-type magnetic field (patent no. 82,053,787). GUO subsequently signed a contract with Harbin Magnetic to manufacture the magnetic cup, the Harbin Magnetic Cup.

The plaintiffs alleged that defendant Gao Chun Lighting manufactured counterfeit Harbin Magnetic Cups, printing GUO's patent number on the counterfeit cups. The plaintiffs filed suit against the defendants in the Intermediate People's Court of Kunming City, the capital of Yunnan province. Plaintiffs asserted that the defendant's conduct constituted a "passing off" of GUO's patent. Plaintiffs alleged that co-defendant, Yunnan Eastern Glass Company (Eastern Glass), also violated GUO's patent rights because it sold

164. 35 U.S.C. §271(a).

165. *See Eli Lilly & Co. v. Medtronic, Inc.*, 872 F.2d 402 (1989).

166. *GUO Li Wen, et al. v. Gao Chun County Lighting Company at al*, reported in *Zui Gao Ren Min Fa Yuan Gong Bao* (PRC Supreme People's Court Gazette), vol. 1, 1994, pp. 43-45.

the counterfeit cups with the knowledge of Gao Chun Lighting's conduct.

The Kunming Intermediate People's Court agreed with the plaintiffs. The court found that from November 1992 to January 1993, defendant Gao Chun Lighting signed a contract to pay co-defendant Eastern Glass RMB¥200,000 to satisfy its prior debt. The contract stated that Gao Chun Lighting would make Harbin Magnetic Cups, using the profits to pay Eastern Glass. Subsequently, from Zhejiang province, Gao Chun Lighting purchased counterfeit cup shells on which GUO's patent number, the Harbin Magnetic name and the Harbin Magnetic Cup trademark were printed (the seller of the counterfeit shells was not a party to the suit). Gao Chun Lighting manufactured the magnets itself. Finally, from Jiangsu province, Gao Chun Lighting purchased the cups' inner flasks, inside of which the magnets were placed to complete the manufacturing process of the counterfeit cups. Subsequently, Gao Chun Lighting delivered 19,740 counterfeit cups to Eastern Glass as payment for the debt at a unit price of RMB¥11 each. The defendants did not dispute the alleged facts.

The Kunming Intermediate People's Court held that, according to Article 63 of the Patent Law, "[w]here any person passes off the patent of another person, such passing off shall be dealt with in accordance with Article 60 of this Law."[167] Article 63 further stated that "[w]here any person passes any unpatented product off as patented product or passes any unpatented process off a patented process, such person shall be ordered by the administrative authorities for patent affairs to stop the passing off, correct it publicly, and shall be subject to a fine."[168] In this case, the defendant attempted to imitate and counterfeit plaintiff's patented products. Further, the defendants counterfeited not only the plaintiffs' product, but also the plaintiffs' trade name and trademark. This, the court held, was a serious passing off.

The court finally held: (1) that the defendants shall pay the plaintiffs' financial loss; and, (2) that the defendants shall pay plaintiff's attorney fees.

The defendants did not appeal this decision.

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167. Patent Law, art. 63, *supra* note 51.
168. *Id.*

Case Analysis—

Passing-off unpatented products as patented products is now actionable under the 1992 patent law, a remedy not available under the 1984 patent law. In the past, China had been known for notorious passing off activities.[169] It certainly did not make sense that Article 63 of the 1984 Patent Law only made it illegal for anyone to use, make or sell a patented product without authorization, but otherwise ignored or tolerated passing off unpatented products as patented products.[170] Realizing the potential disastrous effect to patent protection in China that might be caused by unpatented products being passed off as patented ones, the Seventh People's Congress in September 1992 amended Article 63.[171]

In this case, according to Article 63 of the Patent Law, both defendants engaged in passing off conduct. Although the court did not specifically mention the issue of injunction, the author's understanding is that it might have been implied. This case demonstrated a blatant passing off example, which frankly has not been a rare phenomenon in China. Indeed, despite the 1992 amendment to Article 63 dealing with the issue, it has been reported that some Chinese authorities still tolerate passing off activities.[172]

In the United States, passing off an unpatented product as a patented product is covered by 35 U.S.C. § 292, namely, the anti "false marking" statute. Section 292 states:

"(a) Whoever, without the consent of the patentee, marks upon, or affixes to, or uses in advertising in connection with anything made, used, or sold by him, the name or any imitation of the name of the patentee, the patent number, or the words 'patent,' 'patentee,' or the like, with the intent of counterfeiting or imitating the mark of the patentee, or of deceiving the public and inducing them to believe that the thing was made or sold by or with the consent of the patentee; or

"Whoever marks upon, or affixes to, or uses in advertising in connection with any unpatented article, the word 'patent' or any word or number importing that the same is patented, for the purpose of deceiving the public; . . .

"Shall be fined not more than $500 for every such offense.

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169. ZHENG Cheng Si, The Characteristics, Strong and Weak Points of Chinese Intellectual Property Law, *supra* note 149, p. 75.

170. *Id.*

171. *Id.*

172. *Id.*, p. 77.

"(b) Any person may sue for the penalty, in which even one-half shall go to the person suing and the other to the United States."[173]

In *Mayview Corp. v. Rodstein et al.*,[174] the Court of Appeals for the Ninth Circuit summarized § 292 as requiring a four element test to find false markings: (1) a marking that an object is patented (2) falsely affixed to (3) an unpatented article (4) with intent to deceive the public.[175] This test was in agreement with cases decided by other courts. For instance, in *Petersen v. Fee International*,[176] defendant Fee International misrepresented ownership of plaintiff's patent by falsely marking plaintiff's patent number on defendant's products, when defendant did not in fact own the patent, or acquire plaintiff's authorization. Defendant manufactured "Quali-Kraft" wrenches with a patent number owned by the plaintiff. Defendant's wrenches were not in fact covered by the patent and the defendant knew or should have known that they did not own the patent and such conduct would likely confuse the public.[177] The court held that such false markings had constituted bad purpose and intent to deceive the public.[178] Thus the court held defendant liable for violating 35 U.S.C. § 292.

These U.S. case holdings and analyses were all in great similarity to the holding in this Chinese case. Although the terminologies are different, i.e., "passing off" rather than "false markings," they are in essence extremely similar to each other.

6. China Uses a First-to-File System to Determine Priority, Whereas the United States Uses a First-to-Invent System— *HE Pei Ping v. Wu County Economic & Technology Development Institute* [179]

Plaintiff HE Fei Ping (Ping) was a teacher at Lian Shui County Broadcast and Television University in Jiangsu province. Ping sued Defendant, Wu County Economic & Technology Development Institute (Wu Institute), in the Intermediate People's Court of Nan

173. 35 U.S.C. § 292.

174. *Mayview Corp. v. Rodstein et al.*, 205 U.S.P.Q. 302 (1980).

175. *Id.*, p. 313.

176. *Petersen v. Fee International,* 182 U.S.P.Q. 264 (1974).

177. *Id.*, p. 270.

178. *Id.*

179. *HE Pei Ping v. Wu County Economic & Technology Development Institute*, reported in Zui Gao Ren Min Fa Yuan Gong Bao (PRC Supreme People's Court Gazette), vol. 3, 1990, pp. 28-29.

Jing City, the capital of Jiangsu province, for a utility model patent infringement and priority dispute.

Ping alleged that the Wu Institute infringed his utility patent, titled "Integrated Blue Tile" (patent no. 86,203,975), aimed at the housing construction business, in particular, house roofing. Ping asserted that his patent claims covered all the claims made in defendant's utility patent, titled "New Multi-Piece Tile" (patent no. 87,212,348), which was filed more than a year later than Ping's application, aiming for the same market. Ping asked the court to grant an injunction and economic relief.

The defendant alleged that its utility patent, "New Multi-Piece Tile," was different in all aspects from that of the plaintiff's utility patent, including aesthetics, craftsmanship and materials. Defendant further asserted that its invention concept and processes were entirely independent of the plaintiff, and the defendant had filed its patent application before the grant of plaintiff's patent. Therefore, defendant asserted that it had not infringed plaintiff's patent.

The Nan Jing Intermediate People's Court found that Ping completed his invention in June 1986 and filed his patent application one month later on July 17, 1986. Ping described his tile as: "(1) A tubular tile with a semi-ellipsoidal shaped cross section; (2) the said tubular tile has an upper and lower outer surface, each said outer surface being vertical to the said semi-ellipsoidal shaped cross section and parallel to the long axis of the said cross section; the said upper and lower surfaces have multiple saw tooth like indentations, with certain depths for each indentation; (3) both said upper and lower surfaces are divided into 4 to 7 connected segments, each said segment has equal width to the width of the said tile longitudinally; each said segment is about 30 to 50 cms in length."[180] The CPO published Ping's application on November 7, 1987 and granted Ping's patent on February 28, 1988.

The court further found that the defendant filed its application on October 4, 1987, about one month before the CPO published Ping's application. Defendant decribed his title as "(1) two un-enclosed tiles, one being upper and the other being lower tile, each with a semi-ellipsoidal shaped cross section;(2) both the said upper and lower tiles have multiple indented segments; (3) each said segment on the said upper tile has equal width and length; the said upper tile has 4 to 7 such segments; each said segment being about

180. *Id.*, p. 28. Translation provided by the author. Since the actual Chinese patent was not available to the author, the precision of the author's translation is limited.

30 to 60 cms in length; (4) close to the front edge at the reverse side of the said upper tile, there is a concaved tunnel being 0.5 to 1.0 cm in width, 0.3 to 0.8 cm in depth; close to the front edge of the said lower tile, there is an intruding bump being the same size as the said concaved tunnel; the said upper and lower tiles can be connected by the said tunnel and bump; (5) on the said lower tile, there is a flat surface having the function of stabilizing the said tiles."[181] The defendant had subsequently licensed this patent to 18 companies, earning more than RMB¥260,000 licensing fees.

The plaintiff learned the alleged infringement from defendant's advertisements on television and in the newspaper. This law suit ensued.

The Nan Jing Intermediate People's Court held that, according to Article 59 of the Patent Law, "[t]he scope of protection in the patent right for an invention or a utility model shall be determined by the contents of the patent claim."[182] Although plaintiff's patent claimed "tubular tile" with "saw tooth like indentations," while defendant's patent claimed "un-enclosed tiles" with "multiple indented segments," these two independent claims were substantially the same. Therefore, the court held that defendant's patent infringed that of the plaintiff. Although defendant asserted that the size, materials and color were all different from plaintiff's patent, the court held that these differences were not significant enough to make defendant's patent a new invention, or a significant improvement.[183]

The court however, agreed with defendant's two improvements, namely: (1) the "bump" and "concaved tunnel" that connected each other; and, (2) the "stabilizing" "flat surface." But these differences were held by the court as dependent upon the application of plaintiff's independent claims. Therefore, they would not relieve defendant from the liability for infringing plaintiff's patent.[184]

In determining priority, the court held that, according to Article 9 of the Patent Law, "[i]f two or more applicants apply separately for a patent on the same invention-creation, the patent right shall be granted to the person who *applied first.*"[185] (emphasis added). In this case, since plaintiff filed its patent application more

181. *Id.*
182. Patent Law, art. 59, *supra* note 51.
183. HE Pei Ping v. Wu County, *supra* note 185, p. 29.
184. *Id.*
185. Patent Law, art. 9, *supra* note 51.

than a year earlier than defendant did, the plaintiff won the priority under his first to file status.[186]

Finally, the court granted an injunction and ordered defendant to pay plaintiff RMB¥25,000 damages.

Neither the plaintiff nor the defendant appealed the decision. But the plaintiff and defendant requested the court address the issue of the continued licensing of defendant's technique, because in order for the defendant to further utilize his technique, which did offer some improvement over plaintiff's patent, he must get the plaintiff's permission. In the best interests of scientific technological development, to promote efficient technology transfer for productivity, and to best serve the public, on April 24, 1989, with the help of the Nan Jing Intermediate People's Court, the following agreement was reached:

(1) Plaintiff agreed to transfer its patent to defendant for a one time fee of RMB¥10,000;

(2) Plaintiff agreed not to file a patent infringement suit against defendant; and

(3) Plaintiff agreed to provide help to defendant for the utilization of plaintiff's patent.

Case Analysis—

This case could have been decided differently under the U.S. patent statute. A U.S. court likely would have inquired into more facts as to "who invented first," because the United States is a "first to invent" jurisdiction, whereas China is a "first to file" jurisdiction. This is the single greatest difference between the U.S. patent statute and the Chinese patent law.

Under U.S. patent statute, novelty is defined according to the date of invention, not the date of filing the patent, as noted in 35 U.S.C. §102(a), which states that "[a] person shall be entitled to a patent unless—(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, *before* the *invention thereof* by the applicant for patent."[187] (both emphases added).

Also under 35 U.S.C. §102(g), "[a] person shall be entitled to a patent unless— . . . (g) *before* the applicant's *invention thereof* the invention was made in this country *by another* who had not abandoned, suppressed, or concealed it. In determining priority of in-

186. *Id.*
187. 35 U.S.C. §102(a).

vention there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was *first to conceive* and last to reduce to practice, from a time prior to conception by the other."[188] (all four emphases added). The prior invention by "another" mentioned in this section also refers to the same date of invention as in 35 U.S.C. §102(a).

In a similar case, a U.S. court would look into the facts of whether or not the first who invented had abandoned the invention. This U.S. patent statute has the practical effect of giving an inventor in the United States a longer retrospective grace period than the Chinese patent law would give an inventor in China, because under the Chinese patent law, the fact of "first to invent" would be ignored. The only cut-off date to determine priority in China is the date of filing the patent application, the first to file wins the patent, and that is the end of the question.

The disadvantage to an inventor in China is that if an invention was known or used by others, or described in a printed publication, or the like, anytime before the filing date, no patent will issue. The only recourse available is to take advantage of the few limited exceptions set out by Article 24 of the Chinese Patent Law, which states "[a]ny invention-creation for which a patent is applied shall *not* lose its novelty if, within *six months* before the filing date of the application, one of the following events has occurred:"[189] (both emphases added) (a) if it was exhibited for the first time at an international exhibition sponsored or recognized by the Chinese government; (b) if it was made public for the first time at a prescribed academic or technical conference; or, (c) if it was disclosed by any person without the consent of the applicant.[190]

There are however, strict qualifications for these exceptions. The exhibitions for instance, must have been sponsored by the State Council, or ministries and commissions under the State Council, or other organizations or local government approved by the State Council.[191] The academic or technical conferences must have been sponsored by related authoritative organizations under the State Council or a national academic organization. They do not include

188. 35 U.S.C. §102(g).

189. Patent Law, art. 24, *supra* note 51.

190. *Id.*

191. *RULES FOR THE IMPLEMENTATION OF THE PATENT LAW*, art. 31, *supra* note 56.

organizations below the provincial level.[192] Unauthorized disclosure includes violation of non-disclosure agreements, disclosure under duress, deception, spying, or any disclosure against the applicant's will within 6 months of the application.[193]

The second way the Chinese and U.S. patent systems differ is that the Chinese system has no separate critical date for a statutory bar. It uses the filing date as the only critical date. There is no grace period. Even if one has solid proof of the date of invention, one must still make haste to the patent office, since any public activity, except the ones mentioned in Article 24 of the Patent Law - by the inventor or a third party - prior to the date of filing can disqualify the invention from patentability.

The U.S. patent statute, however, is more lenient and sets out a critical date of one year prior to filing, giving the patentee one year from the date of public disclosure to file a patent: "the invention was patented or described in a printed publication in *this or a foreign country* or in public use or on sale in this country, more than *one year prior to the date of the application* for patent in the United States."[194] (both emphases added). A U.S. inventor however, should be aware of this difference if a Chinese patent right is to be preserved, because this one year grace period provided by 35 U.S.C. §102(b) might not available if one wants to file a patent in China.

VI. IMPLICATIONS FOR FUTURE PATENT LITIGATION IN CHINA INVOLVING FOREIGN ENTITIES

As China steps into the international intellectual property market, it has quickly realized the drawbacks of its existing patent system, and it has made tremendous efforts to improve it. China has realized that the amount of intellectual properties owned by a country has become a measuring standard for its competitiveness in today's global economy. One should note that China virtually started from scratch about 15 years ago, and it now has built a patent system that is quite comparable to those of the developed nations, such as the United States, Japan and Germany. China indeed has absorbed many "good" laws, in light of its own realistic view, from these nations and combined them into the Chinese patent system—

192. *Id.*
193. *Id.*
194. 35 U.S.C. §102(b).

although this may not be a full indication that China is effectively enforcing its patent law.

China has had a long history of considering intellectual property rights to be a developed nation concept to hinder the transfer of advanced technologies and to exploit the developing world.[195] Even among scientific professionals, patents were not considered important, because patents were not connected with profit, let alone the fact that no one could own a monopolizing right in the past. For example, even today, the Chinese scientific community still does not give enough weight to patents, perhaps because historically China did not have an efficient patent system, or because of the absence of efficient transfers of inventions into profits resulting from the old influence of the former planned economy. It has been reported that today, among the important high tech projects sponsored by the central government, the number of publications on journal or thesis was 81 times higher than the number of patents filed from these important projects.[196] The number of product appraisals was 5 times higher than patents and, the number of reward certificates was 2.3 times higher than patents.[197] Because of the lack of understanding of the importance of intellectual property, research projects were often negligently repeated by different departments within one organization. In those days, even the huge but well- funded Chinese Academy of Science suffered from big problems of repetitious projects by departments in different parts of the country. It was reported that such a repetitive research rate was as high as 60%, causing ridiculous wastes of resources and manpower.[198]

China has many good reasons to improve its patent system. One of these reasons is that China has been eager to join the World Trade Origination (WTO) so that China can better position itself in future trade-related disputes involving intellectual properties. It would be in China's best interests for the WTO to arbitrate such disputes. For instance, the arduous negations between China and

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195. Michel Oksenberg, et al., Advancing Intellectual Property Rights: Information Technologies and the Course of Economic Development in China, *supra* note 36, p. 5.

196. YUAN De, LU Ying and *Wu Gui Sheng, Hu Huan Zhi Shi Chan Quan Bao Fu* (A warning call for more intellectual property protection), Beijing: *Fa Zhi Ri Bao* (Legal daily), October 25, 1997, p. 1.

197. *Id.*

198. LI Li, *Mian Shou Cheng Guo Liu Shi Chong Fu Yian Jiu Zhi Ku* (Avoiding the pain and waste of repetitive research), Beijing: *Fa Zhi Ri Bao* (Legal daily), May 21, 1997, p. 1.

United States on the issue of intellectual property protection in China, during January 1992, March 1995 and June 1996, could have been submitted to WTO for arbitration if China was a member of WTO.[199] But China's application has not been approved so far, and one of the major reasons for the rejection was China's poor performance on the protection of intellectual properties.

But the author has certainly noticed a significant improvement in the awareness of and respect for IPR by the Chinese community as a whole, when compared with the situation 10 or 15 years ago. In the past, many disputes, legal or administrative, were mostly settled through arbitration or negotiation between individuals or working units. "Take it to court" was something most people did not know how or did not want to do, because of the lack of trust and confidence in the old legal system. Most people never heard of "intellectual property rights" and, when it was indeed violated by others, few would realize it. Because IPR violations were so prevalent in society at that time, it was a "no big deal," and the fact that most courts then were not competent to handle intellectual property cases, and did not have an effective patent law to follow, only exacerbated the problem.

But today, the situation has changed significantly, thanks to the new patent law and the improved Chinese legal system as a whole. People do see the results from going to court to fight for their rights. The Chinese community has gradually realized that when the courts are equipped with better patent law, the courts might make a difference in protecting these rights.

It has been reported that during 1990 to 1995, Chinese courts handled a total of 3,106 patent violation cases nationwide.[200] However, this is not to say that the courts have been working efficiently, because there are multiple fora, such as the CPO, the PRB, the Chinese Legislature, and the State Council, and all are entangled together with the courts. It was reported that among the 3,106 cases mentioned above, the courts rendered final decisions in only 266

199. LIU Jian Wen and ZHANG Chuan Bing, *Qian Xi «Shi Jie Mao Yi Zu Zhi • Zhi Shi Chan Quan Xie Yi» Dui Zhong Guo Zhi Shi Chan Quan Li Fa De Ying Xiang* (Analysis of the influence on China's intellectual property law legislature by the World Trade Organization and TRIPS), Wuhan: *Wuhan Da Xue Fa Lu Ping Lun* (Wuhan University law review), vol. 2, 1997, p. 77.

200. YANG Jin Qi, *Zhong Guo Zhi Shi Chan Quan Fa Lu Zeng Dai Wan Shan De Ji Ge Wen Ti* (Chinese intellectual property law: some of the issues to be resolved and improved), Hong Kong: China Law (Chinese-English Bilingual), January 1997, pp. 21-28 (Chinese).

cases. In 460 cases, the court could not reach a final decision because of obstacles from burdensome administrative or legal procedures. The rest of the cases noted were simply pending for other reasons.[201]

However, confidence in the Chinese patent system is increasing, which may be partially evidenced not only in the Chinese community, but also in the international community, by the fact that among the 625,309 patent applications filed with the CPO during the 11 years from 1985 to 1996,[202] over 14% of them, that is more than 87,540 applications, were from over 70 foreign countries.[203] Among them, the United States, Japan and Germany dominated the top three.[204] Of these applications, 62% of them were utility patents. Interestingly, in 1994, China had over 46,000 applications, a number that surpassed all other nations for that year.[205]

Realizing the existing problems the Chinese courts were facing, and the important role the court system plays in building China's patent system, the China Supreme People's Court on September 29, 1994 issued a special circular notice to address this issue.[206] The Supreme Court took notice that "passing off," among other violations, had been a serious problem and that violators should be punished. It emphasized that those courts which handled intellectual property dispute cases should hire a certain number of judges with experience in intellectual property litigation, especially those who have a science background and understand a foreign language.[207] The Supreme Court further suggested that in big cities, at the intermediate and higher people's court levels, it might be necessary to establish special intellectual property trial courts.[208] The Supreme Court also suggested that each people's court should organize study sessions for judges to master intellectual property law so that they

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201. *Id.*

202. YUAN De, The Booming of Patent Applications in China, *supra* note 10.

203. GAO Lu Lin, *Wai Guo Ren Ru He Zai Zhong Guo Xun Qiu Zhuan Li Ji Shu Bao Hu* (How do foreigners seek patent protection for their technology in china), Hong Kong: China Law (Chinese-English Bilingual), January 1996, pp. 26-28 (Chinese).

204. *Id.*

205. *Id.*

206. China Supreme People's Court Circular Notice, *Zui Gao Ren Min Fa Yuan Guan Yu Jin Yi Bu Ji Qiang Zhi Shi Chan Quan Si Fa Bao Hu De Tong Zhi*, (Regarding further strengthening judicial protection for intellectual property), Beijing: *Zui Gao Ren Min Fa Yuan Gong Bao* (PRC Supreme People's Court Gazette), vol. 4, 1994, p. 139.

207. *Id.*

208. *Id.*

can be better equipped to deal with the ever increasing complexity of intellectual property litigation.[209] Finally, the Supreme Court suggested that people's courts should also play an active role in the education of the general public toward respecting and protecting intellectual property rights. These steps demonstrated that the Chinese judicial system at the highest level realizes that China still has an arduous path toward the protection of intellectual property. Encouragingly, China is making every effort to resolve its existing problems and is hoping for more improvement.

One should realize that Chinese intellectual property law, and patent law in particular, is only part of the integral Chinese legal system that is changing and improving everyday, along with China's fast-developing economic success. The only difference between the patent law (including trademark and copyright laws) and other areas of Chinese law is that patent law gets more scrutiny from outside China, namely, from the international community, and in particular, the developed nations. China has adopted many western patent laws. Indeed, the majority of China's patent laws are similar to those of the United States, except for some differences, such as the issue of priority and service related inventions.

Of course, patent litigation in China does not only depend on the patent law itself, it also depends on Chinese court procedures and other factors. But patent law certainly is the foundation for patent litigation. The outside world should not lose sight of the progress that China has made in establishing an intellectual property regime nor underestimate the many obstacles that were overcome in establishing such a regime. Failure to acknowledge the progress and difficulties creates a perception in China of foreign arrogance.[210]

The environment and prospects for intellectual property protection in China are changing for the better, although that may not be fast enough for Westerners. At the present time, not much patent litigation in China involves foreign entities. From the limited resources available, the author found only a few cases that involved foreign parties at some level. The author, however, expects that the number of cases involving foreign entities will grow significantly in the next century, as China becomes a more powerful international market player. As more foreign technologies pour into China, and

209. *Id.*

210. Michel Oksenberg, et al., Advancing Intellectual Property Rights: Information Technologies and the Course of Economic Development in China, *supra* note 36, p. 30.

China's technology sector quickly absorbs these technologies, the Chinese technology industry will become more sophisticated and better developed. As a result, more foreign technologies can be directly used or even independently developed by the Chinese enterprises, and more patent litigation involving foreign parties will surely follow. The author also expects the patent litigation environment in China to move toward a system that is more compatible with the international community's, especially when more international parties are involved in future patent litigation in China.

VII. CONCLUSIONS

China as a developing nation still has many obstacles to overcome on its way towards maturing as a society in which intellectual property, in particular patents, can be efficiently protected at the same level as that of developed nations. This path may still be long and the tasks China needs to accomplish are still many. Nevertheless, China's patent protection system will develop along with its economy. The tension between those nations that produce more advanced technologies and seek to obtain rewards for their innovations and those nations that seek to profit by copying or imitating the innovations of others is not unknown to China. It seems clear that technology-importing countries like China will continue to lag behind in innovation unless they develop their own intellectual property regimes to attract the transfer of advanced technologies and to nurture their own technology industries. This transformation is quickly taking place in China and has been demonstrated by today's Chinese industries, which have developed many of their own technologies and need protection against Chinese violators in China. Thousands of patent litigations have been filed in the past decade in China, mostly among Chinese companies, for the protection of their own relatively moderate level of technology. As China further develops into a more advanced country, it might merge into an innovation producing country, taking the path that Japan and Taiwan took before they became technology exporting countries. When that balance is struck, hopefully soon, China may join those developed nations demanding protection for their own technologies in the global market, as well as better protecting others' technologies in China. In today's environment, international pressure on China to improve its protection in intellectual property rights is significant. The willingness of China to cooperate, might well expedite the process of turning China into a country in which foreign nations can freely transfer technologies, without fear of losing their profits.

LIST OF ABBREVIATIONS

CCPCC	Chinese Communist Party Central Committee
EAAC	China Economic Agreement Arbitration Commission
CPL	Chinese Patent Law
CPO	China Patent Office
CSC	China State Council
CSPC	China Supreme People's Court
IETAC	China International Economic and Trade Arbitration Commission
IPR	Intellectual Property Rights
PCSC	China People's Congress Standing Committee
PCT	Patent Cooperation Treaty
PRB	China Patent Reexamination Board
PRC	People's Republic of China
SSC	China State Science Commission
TAAC	China Technical Agreement Arbitration Commission
WIPO	World Intellectual Property Organization
WTO	World Trade Origination
USTR	United States Trade Representative

Glossary
(Chinese Pinyin and Chinese Simplified Characters)

An Hui Ke Xue Ji Shu Chu Ban She 安徽科学技术出版社
Beijing Boilers Co. v. PAN Dai Ming 北京锅炉厂告潘代明
Beijing Da Xue Chu Ban She 北京大学出版社
Duo Dui Duo 多堆垛
Duo Dui Duo International v. Fu Wei Cooling & Heating 多堆垛国际股份有限公司告深圳富威冷暖设备有限公司
Fa Xue Za Zhi 法学杂誌
Fa Zhi Ri Bao 法制日报
Guan Yu Jia Qiang Zhong Guo Zhuan Li Bao Hu Wen Ti De Tan Tao 关于加强中国专利保护问题的探讨
Guo Fang Bu Yin Zhi Chang 国防部印制厂
Guo Jia Jian She Cong Kan 国家建设丛刊
GUO Li Wen v. Gao Chun County Lighting Company 郭立文〔哈尔滨磁化器厂〕告高淳县灯饰公司
HE Pei Ping v. Wu County Economic & Technology Development Institute 何沛平告吴县经济技术发展研究所
Hu Huan Zhi Shi Chan Quan Bao Fu 呼唤知识产权保护
LU Zheng Ming v. Shanghai Construction Equipment Co. 陆正明告上海工程成套总公司
Mian Shou Cheng Guo Liu Shi Chong Fu Yian Jiu Zhi Ku 免受成果流失重复研究之苦
Min Zhu Yu Fa Zhi 民主与法制
Qian Xi "Shi Jie Mao Yi Zu Zhi ¡E Zhi Shi Chan Quan Xie Yi" Dui Zhong Guo Zhi Shi Chan Quan Li Fa De Ying Xiang 浅析《世界贸易组织·知识产权协议》对中国知识产权立法的影響
Ren Min Fa Yuan Chu Ban She 人民法院出版社
Ren Min Ri Bao Hai Wai Ban 人民日报海外版
Shi Jie Wu Bai Qiang Gong Si You San Bai Duo Jia Lai Hua Tou Zi 世界五百强公司有三百多家来华投资
Wai Guo Ren Ru He Zai Zhong Guo Xun Qiu Zhuan Li Ji Shu Bao Hu 外国人如何在中国寻求专利技术保护
Wang & Wang v. CPO 王甲、王乙告专利局专利复审委员会
Wo Guo Shou Li Zhuan Li Shen Qing Chi Xu Zeng Zhang 我国受理专利申请持续增长
Wo Guo Zhuan Li Shen Qing Fang Xing Wei Ai 我国专利申请方兴未艾
Wuhan Da Xue Fa Lu Ping Lun 武汉大学法律评论
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